

[2024] PBSA 28**Application for Set Aside by Kelly****Application**

1. This is an application by Kelly (the Applicant) to set aside the decision made by an oral hearing panel (the panel) dated 9 April 2024 not to direct the release of the Applicant. The application was made by his legal representatives.
2. I have considered the application on the papers. These are the dossier of 446 pages; the oral hearing decision reasons (the decision) and the application for set aside dated 24 April 2024.

Background

3. On 21 August 2017 the Applicant received a determinate sentence of a total of 12 years imprisonment. The sentence was made up with the following: 8 years for aggravated dwelling burglary; 3 years consecutive for robbery and 12 months consecutive for possession of heroin with intent to supply. He received a number of concurrent sentences at the same time for three counts of possession of an offensive weapon; another robbery; blackmail; taking and driving a motor vehicle without consent and theft (shoplifting). His sentence will expire in January 2029.
4. The Applicant has a number of previous convictions, largely related to acquisitive or dishonest offending including aggravated vehicle taking and burglary. He has also been convicted of possessing a bladed article as well as failures to comply with court orders and bail. He was 25 years old when sentenced, and is now 31 years old.

Application to Set Aside

5. The application to set aside is dated 24 April 2024 and has been submitted by the Applicant's legal representatives.
6. The Applicant relies on the ground that there has been an error of law or fact (where the proceedings were unlawful or relied on factually incorrect information) and the decision would not have been made were it not for the error. It is submitted that the errors relate to the following, and I quote directly from the application:

"The issue surrounding the money seized by Police had been dealt with via bank statements provided by [the Applicant's] mother which were included within the dossier and available for the Parole Board panel to consider.

Greater Manchester Police (GMP); the Police force who had seized the money from within [the Applicant's] parents address; had returned £9011.59 to [his mother]



within a period of approximately four weeks of his initial arrest. The money recovered from his father's trouser pocket was also returned to him.

GMP would not have returned the money to [the Applicant's] parents without having been satisfied that the documentary evidence provided to them satisfied their enquiries sufficiently to establish that this money did indeed belong to them. If there was any doubt whatsoever about the source of these monies and/or the accounts provided to them by [the Applicant's] parents, then GMP would have either commenced a criminal investigation in respect of an offence of money laundering or sought a cash confiscation order from Tameside Magistrates Courts under the Court's civil jurisdiction... It is understood that neither course of action was undertaken in this instance as is evinced by the return of these monies by GMP by 18th May. The procedure for the actual return of monies seized takes some time once the investigating officer authorises the release of the funds via GMP financial unit.

Not only was the money returning (sic) to [the Applicant's] parents, but the Police Investigation was concluded with a Notice of No Further Action (NFA) being issued within a very short space of time. There were no further lines of enquiries for the Police to pursue and the matter was closed.

It would have been open for the Parole Board to have required an officer in this investigation to attend at the hearing to explore their concerns further regarding the accounts and documentation provided in respect of the source of these monies.

[The Applicant] feels that if the Parole Board had considered the fact the money must have belonged to his parents for GMP to return it to them, that there may have been a different decision in this case.

There is no suggestion ... that the proceedings were unlawful."

Current Parole Review

7. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether it would be appropriate to direct his re-release following the revocation of his licence. The Applicant had been released automatically on licence by the Respondent on 25 January 2023, and was recalled to custody on 18 April 2023, and returned to custody the next day. The circumstances leading to his recall was that he was arrested on suspicion of being involved in the discharge of a shotgun at the front door of a property. A search of his address recovered 3 machetes, a large amount of cash and a number of mobile phones. He was recalled for failing to be of good behaviour and undermining the purpose of the licence period. The police took no further action with respect to these matters.
8. A single member panel of the Parole Board considered the Applicant's recall case on 21 August 2023 (Member Case Assessment (MCA) process) and directed an oral hearing. Also directed were further reports, including a report from the police about the matters for which the Applicant had been arrested and asking why the seizure of items had not led to any prosecution.
9. I note that the decision letter states (and this is not disputed in the application) that the police reports indicate that threats were made with a gun prior to discharge and that

helmets and balaclavas were worn by the offenders who used the gun. Similar items were recovered from the Applicant's address. The decision letter also indicates that the reasons given for not prosecuting the matter were poor CCTV evidence and witnesses failing to name any offenders. It appears this decision was made prior to June 2023, as a report by the Applicant's Community Offender Manager (COM) in the dossier indicates that the matters have been NFA'd.

10. Following the notification of no further action, the Respondent considered whether the Applicant should be released executively (i.e not by the Parole Board), and decided not to release.
11. The case was listed to be heard by a panel of the Parole Board on 8 April 2024, with two members. The panel chair directed on 19 February 2024 that all directions for reports had been met and no further reports were directed.
12. Two independent members of the Parole Board heard the case on 8 April 2024 via a video link. This was the first review of the Applicant's recall. The Applicant has been legally represented throughout this review. Evidence was taken from the Applicant's Prison Offender Manager (POM), his COM at the time of recall and his current COM, who had taken over his case since his recall to custody. The witnesses supported re-release.

The Relevant Law

13. Rule 28A(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) 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.
14. The types of decisions eligible for set aside are set out in rules 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)).
15. 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.
16. I considered whether the case of **Pearce [2023] UKSC 13** on appeal from **[2022] EWCA Civ 4** was relevant in this case, along with the Parole Board Guidance on Allegations published in September 2023. I have decided that although there are unconvicted allegations involved in this case, it is not relevant for this set aside application. I do not find that the panel made relevant findings with regard to the allegations.

The Reply from the Respondent

17. In accordance with the rules, the Respondent was asked if he had any representations to make within seven days. On 29 April 2024 the Public Protection Casework Section (PPCS), representing the Respondent, indicated that they had no submissions to make in relation to the application.

Discussion

18. The set aside application focuses on the issue of money seized at the time the Applicant's home was searched. The dossier indicates that some £11,000 was found in a safe.

19. The application does not suggest that there is an error of law in the panel's approach or decision. I have therefore focused on whether or not the panel relied on "*factually incorrect information*". The application states that had the panel accepted the Applicant's account in relation to this money, the panel may have come to a different decision in his case.

20. I first must consider whether the panel, when considering its evidence, relied on factually incorrect information. If I find that it did, then I should consider whether or not that error contributed to the decision that the panel arrived at.

21. With respect to the money, there is the following evidence that I consider to be "fact":

- (a) About £11,000 was recovered in a safe at the Applicant's address, which he shared with his mother (and perhaps others, it is not clear). This is not a disputed fact.
- (b) A '*large amount of money*' (this taken from one of the police witness reports and other police reports) was also found in the Applicant's trouser pocket. There is little further information about the provenance of this money and this does not appear to have been explored at the hearing, or not recorded in the decision letter if it was.
- (c) The Applicant gave a '*no comment*' interview at the police station, under caution and legally represented.

22. The decision letter records that the Applicant told the panel that he knew nothing about the money in the safe. It further states that he said that after his recall his mother had told him that it was inheritance money from his aunt who had recently died, and also perhaps some backdated Personal Independence Payment (PIP) payments.

23. The decision letter makes no further specific reference to the money. However in a paragraph following taking evidence about the items seized by the police, the panel makes what I consider to be an all-encompassing reference to all the items, therefore including the money. While not referring to the money, the paragraph does specifically refer to the helmet, balaclava and machetes. The Applicant, during the hearing, admitted owning the helmet and balaclava, explaining these were used for his motorcycle. However the panel also noted that the motorcycle had recently been sold, and also that the Applicant accepted that he had been disqualified from driving.

24. This '*all encompassing*' paragraph states that "*While fully accepting the police/CPS decision to take no further action, the panel considered [the Applicant's] explanations regarding the items seized as 'questionable'*".

25. I am struggling to find where the *"factual error"* is. While the panel is dubious about the Applicant's evidence, there is no doubt that the money was found.
26. I do consider, however, that the panel did not make it clear that the money could have belonged to someone other than the Applicant, although it records his evidence that it was in a safe he knew nothing about.
27. I then considered whether the panel's stated opinion that the Applicant's explanations for the items seized (therefore including the money) was *"questionable"* was so material that it was a significant reason for the panel's decision.
28. I do not find that is the case. In its conclusion, the panel notes that the Applicant had been released automatically following commission of a number of very serious offences, *"with little evidence that the risk of serious harm had been reduced"*. The panel disagreed with the professional witnesses that his risk could be managed in the community *"given the lack of insight and development of internal controls"*. The decision letter notes that the Applicant had completed some offence focused work, however that this was insufficient to address his risk factors. The decision letter then lists a number of risk factors that remain of concern. These risk factors emerge from the panel's analysis of the Applicant's offending.
29. The decision letter, other than exploration of the circumstances of the recall and to make a finding that the recall was appropriate, does not focus on the recall in its assessment or risk or its conclusion. The panel does give credit to the Applicant having spent almost 3 months in the community before recall. The only other comment about the recall circumstances is where the decision letter indicates concern that the recall came shortly after the Applicant had moved on from the more intensely supervised environment of Approved Premises. I do accept that the panel could have been clearer about any findings or otherwise about the various items seized by the police, this omission does not change my decision.
30. I do not find that the panel relied on the issue of the money seized when the Applicant's property was searched in coming to its decision. The test that the panel has to consider when deciding release is clear, and this is correctly stated in the letter: *"The Parole Board will direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined"*. This may or may not include the circumstances of any recall. In this case the panel focused on the wider risks it considered the Applicant presented to the public, taking the Applicant's offending history into account. I find that the panel would have made its decision not to release even if it had made a clear finding that it believed the Applicant's account in relation to the money.

Decision

31. For the reasons I have given, the application is refused, and the decision of the panel dated 9 April 2024 is final.

Chitra Karve
03 May 2024