

[2024] PBSA 45**Application for Set Aside by Bailey****Application**

1. This is an application by Bailey (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 (122 pages), the decision (dated 3 June 2024), and the application for set aside (dated 19 June 2024).

Background

3. On 9 June 2023, the Applicant received a total two year determinate sentence following conviction for harassment (breach of restraining order), public order offences, theft and criminal damage.
4. He was automatically released on licence on 29 January 2024. His licence was revoked on 10 February 2024, and he was returned to custody on 12 February 2024. This was his first recall on this sentence. His sentence expiry date is reported to be in August 2024.
5. The Applicant was aged 37 at the time of sentencing. He is now 38 years old.

Application for Set Aside

6. The application for set aside has been drafted and submitted by solicitors acting on behalf of the Applicant.
7. The application for set aside submits there has been an error of fact.
8. The content of the application will be considered in the **Discussion** section below.

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether to direct his release. This was his first review since recall.
10. The case was reviewed by a single member panel on the papers. The panel made no direction for release.

The Relevant Law

11. Rule 28A(1)(a) of the Parole Board Rules 2019 (as amended) 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.
12. 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)).
13. 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

14. The Respondent has submitted no representations in response to the application and the deadline for representations has passed.

Discussion

15. The Applicant argues that there are two factual errors:
- a) It is said that he refused to return to his designated accommodation; and
 - b) It is said that he stayed out overnight.
16. Both these matters are disputed.
17. A reading of the Recall Report (Part A) within the dossier shows that the Applicant's Community Offender Manager (COM) did not state that he refused to return to his accommodation. It says that he *'failed to return for his curfew by a number of hours'*.
18. The first mention of purported refusal comes later in the report when the Senior Probation Officer (SPO), endorsing the COM's decision to recall the Applicant, states *'[the Applicant] refused to return to [the accommodation]'*.
19. There is no evidence within the Part A that suggests the Applicant refused to return to his accommodation.

20. This view is reinforced by the content of the Post Recall Risk Management Report (Part B) in which the Applicant accepts he was *'a few hours late for his curfew'* and his COM asked him *'why he was late for his curfew'*.
21. There is no mention of refusal or an overnight stay.
22. The Applicant's licence indicates his curfew began at 7 p.m. The ordinary meaning of *'a few hours'* suggests he would have most likely been back at his accommodation before the morning and there is no evidence to suggest there was an overnight absence.
23. I am therefore satisfied that the panel's statements that the Applicant *'refused to return'* (para. 2.1) and *'failed to return...overnight'* (para. 4.1) are errors of fact.
24. It does not automatically follow that an error of fact means that the decision must be set aside. The next question becomes whether the decision to refuse release would not have been made but for that error.
25. The timing and refusal (or otherwise) to return to the designated accommodation were clearly factors that influenced the decision. However, they were not the only factors. The panel also refers to concerns that the Applicant presented with injuries that may have been indicative of violence. The panel concluded that the Applicant's re-release warranted an oral hearing to explore and test the circumstances of the recall and the suitability of the proposed risk management plan. However, there would not be sufficient time to arrange an oral hearing before the Applicant's sentence ended.
26. The panel's conclusion that an oral hearing would have been the most appropriate way of dealing with the determination of this case is entirely rational.
27. The proximity of the sentence end date was the primary reason in refusing the Applicant's release, and that date is immutable. Even if the panel had correctly stated that the Applicant was a few hours late for his curfew and did not stay out overnight, the other matters it raised remain appropriate for an oral hearing and there is no time to convene one. I cannot therefore find that the panel would have made a different decision but for its error, and consequently the application for set aside fails.

Decision

28. For the reasons I have given, the application is refused.

Stefan Fafinski
22 July 2024