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[2023] PBSA 2

Application for Set Aside by Martin

Application

1. This is an application by Martin ("the Applicant") under rule 28A(1) of the Parole Board Rules 2019 to set aside a decision of the Parole Board dated 12 December 2022 declining to release him. The decision followed an oral hearing on 5 December 2022. The application is made on the ground that the decision would not have been made but for an error of law and/or fact and that it is in the interests of justice to set it aside.

2. Rules 28A(4) and (5) of the Parole Board Rules, so far as relevant to this application, provide that a decision maker appointed by the Parole Board may set aside an eligible decision (as set out in rule 28A(1), (2) and (4)) if the decision maker is satisfied that the decision would not have been made but for an error of law or fact and that it is in the interests of justice to set aside the decision.

3. I have considered the application on the papers. These are: (1) the dossier, now running to some 463 pages including the decision letter and (2) the application to set the decision aside, dated 1 January 2023.

Background

4. On 8 July 2016 the Applicant, then aged 50, was sentenced to determinate terms of imprisonment for two conspiracies – one to supply amphetamine, one to supply cannabis. The sentences, as subsequently reduced on appeal, were 7 years and 4 years consecutive, making a total of 11 years.

5. In summary, the Applicant was the main operator of a serious organised crime group which he had formed using contacts throughout the United Kingdom. When it was broken up the police seized some 300 kilograms of drugs and £1.2 million in cash. In all some 23 people were sentenced to imprisonment for their involvement in it.

6. The Applicant had already served 2 terms of imprisonment for involvement in drug supply. On 7 December 2004 he was sentenced to 3 years imprisonment for offences of possession with intent to supply. Most significantly, on 2 June 2006 he was sentenced to 9 years imprisonment for conspiracies to supply amphetamine and cannabis.

7. On 17 December 2020 the Applicant was automatically released at the half-way point of his sentence. There was a condition of his licence that he must not contact

serving or remand prisoners without the approval of his supervising officer. On 8 July 2021 he was returned to prison, his licence having been revoked for breach of this condition. He had contacted three different serving prisoners, all offenders serving substantial terms of imprisonment for drug offences, all in open prisons, while they had access to telephones during periods of leave outside prison. He did not dispute that such contact had taken place without the approval of his supervising officer; his case was that he believed the three people to have been released and was not aware that they were still in open prisons.

The Grounds of the Application

8. As noted above, the application is made on the basis that the panel made an error of law or fact or both. The key passages in the application are to be found on pages 12 and 13 in representations by the Applicant's legal representative. The grounds are not numbered; for the purpose of analysis I consider they can fairly be considered under four headings, although they overlap to some extent. These are:

    a. Focus on breach of licence. It is argued that the panel misapplied the test for release, in that its focus was on assessing the Applicant's likely compliance with licence conditions, rather than on the risk of serious harm to the public. The panel did not properly apply the test in the Applicant's case because there was no evidence that he posed a risk of serious harm to the public, to a known adult or to any other category of person – as evidenced, it is suggested by the current "ROSH scores" which were low.

    b. Failing to focus on current level of risk. It is argued that the panel misapplied the test for release, in that it failed to focus on his current level of risk, which was not said by any professional to be high.

    c. Findings about the telephone calls. It is argued that the panel erred in law or in fact because it did not make any findings as to what occurred during the telephone calls between the Applicant and the three prisoners. The panel therefore could not safely say, or find on the balance of probabilities, that the telephone calls involved discussions about criminal activity, or the planning of criminal activity.

    d. Assessment of the Applicant. It is argued that the panel erred in law or in fact because it did not apply its general remarks about the risk of harm inherent in drug dealing to the specific circumstances of the Applicant.

9. In considering ground c above, I have kept in mind the decision of the Court of Appeal in **Pearce, R (On the Application Of) v Parole Board of England and Wales & Anor** [2022] EWCA Civ 4 which is relevant to the question whether and to what extent it was necessary for the panel to make findings of fact on the balance of probabilities relating to the telephone calls. That case has now been heard in the Supreme Court and the judgment is awaited.

Current parole review

10. As noted above, the oral hearing took place on 5 December 2022. There was a judicial chair and a co-panellist who was a psychologist. Evidence was given by the Prison Offender Manager ("the POM"), the Community Offender Manager ("the COM") and the Applicant himself.

11. The panel had, within the dossier, a schedule and statements containing information as to the telephone calls between the Applicant and the serving prisoners. Calls were initiated both by the Applicant and by each serving prisoner. In all there were more than 60 occasions of contact varying between a few seconds and 13 minutes. The Applicant adhered to his account that he did not know the people to whom he was speaking were still serving prisoners; he said he had not discussed their current lives or whether they were still in prison.

12. The panel did not accept the Applicant's evidence. It did not consider him to be an honest and open witness. It found that it was inconceivable he did not know that the three men were serving prisoners and that they would only have discussed family matters.

13. The panel then spelt out what were in its view the consequences of this finding. It said, in paragraph 4.8 -

"… it is difficult to ignore the suspicion that the discussions might have centred on more criminality. The panel does make a positive finding that [the Applicant] was spending time in conversations with people in his same line of work and must have known he was breaching his licence conditions. It does raise the possibility of offence paralleling behaviour and the risk of future alliance with fellow drug dealers at any stage in the future."

14. Later the panel said, in paragraph 4.10 -

"The panel's impression of [the Applicant] was that he was not an open and honest witness. The panel did not believe his account of the phone conversations and had the impression that he was withholding information when asked specific questions on crucial issues. Consequently, it was likely that future supervision would be superficial and that [the Applicant] would not disclose all the details of his activities to his supervising officer, which could frustrate detection of early warning signs."

15. The panel had adverted, in paragraph 4.3, to the fact that people who engage in drug dealing can cause harm in a number of ways – including violence to rival gang members and to drug users in debt, as well as other forms of criminality. It stated in paragraph 4.14 its conclusion that the Applicant's risk could not safely be managed in the community and that it was necessary for the protection of the public that he remain confined.

The relevant law

16. The decision not to release the Applicant was taken under rule 25(1)(b) of the Parole Board Rules 2019. Such a decision is a final decision and is eligible for the set aside procedure: see rule 28A(1) and (4) of the Rules. I have been appointed as decision maker for the purposes of this application.

17. An application under rule 28A(1) must be brought within 21 days of the decision: see rule 28A(6)(b). That requirement has been satisfied in this case.

18. Rule 28A(4) provides that the decision maker may set such a decision aside if satisfied that (1) one of the conditions in rule 28A(5) is applicable and (2) it is in the interests of justice to do so.

19. The condition on which the Applicant relies is set out in rule 28A(5)(a) which provides

> *"(a)the decision maker is satisfied that a direction given by the Board for, or a decision made by it not to direct, the release of a prisoner would not have been given or made but for an error of law or fact."*

The reply on behalf of the Secretary of State

20. The Secretary of State ("the Respondent") has indicated that no representations are to be made in respect of this application.

Discussion

21. The first question is whether there was an error of law or fact on the part of the panel.

22. The panel correctly stated the test for release: a direction for release must be made if and only if the panel is satisfied that it is no longer necessary for the protection of the public that the prisoner be confined.

23. It is well established that the protection with which the Parole Board is concerned is protection from serious physical and psychological harm. There can be no doubt about the potential for a serious organised crime group dealing in drugs on a substantial scale to cause serious physical and psychological harm. The panel noted some of the risks in paragraph 4.3 of its reasons. Others are set out in the OASys assessment of the Applicant at paragraphs 2.4 and 2.5 (dossier, page 388). The Applicant, having twice been involved in serious organised crime groups at a significant level, plainly had the capacity to cause serious physical and psychological harm if he returned to leadership or involvement in such a group.

24. The OASys assessment of the Applicant which the panel accepted was that he posed a medium risk of serious harm to the public. A medium risk is defined as follows:

> *"The offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances, for example, failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse."*

25. In the Applicant's case a key risk factor – the kind of change in circumstances to which the definition refers – was the risk that he would return to a pro-criminal lifestyle and associate with a negative peer group. This would have the potential to lead to him yet again becoming involved in serious organised crime relating to

drugs. The licence condition preventing him from contacting serving or remand prisoners aimed to address this risk. Deliberate breach of this licence condition would therefore relate directly to level of risk.

26. Against this background I will now consider the various criticisms of the panel's decision which I have identified above.

27. Focus on breach of licence. The panel was concerned to decide whether the Applicant's contact with the three prisoners was inadvertent (as he suggested) or a knowing breach of licence. For the reasons I have explained, whether he was in knowing breach of condition 10 of the licence was relevant to the risk of serious harm he posed. Having made its finding that the Applicant was knowingly in breach of licence, the panel then considered what this finding entailed for the future – whether he would breach licence conditions and be involved with criminal associates again and whether he would be open with his supervising officer – elements of the risk management plan which were key to ensuring he did not again become involved in a serious organised crime group. I see no error of law in the panel's approach.

28. Failing to focus on current level of risk. The panel was not only concerned with current level of risk: see **Secretary of State for Justice, R (On the Application Of) v The Parole Board of England and Wales & Anor** [2022] EWHC 1282 (Admin) (27 May 2022), the essential reasoning of which applies to determinate as well as extended determinate sentences. The panel was required to consider the Applicant's risk in the medium and long term as well as the short term. Thus, for example, it was not critical to the panel's decision whether the Applicant had already started to plan criminal activity in the telephone calls; the panel was both entitled and required to consider the implications of his breaches of licence for his future conduct and risk, as it did.

29. Findings about the telephone calls. The panel made positive findings about the telephone calls – in particular, that the Applicant knew that he was breaching his licence conditions. It then took those positive findings into account in assessing his future risk. I do not think it was required to make a positive finding that the telephone calls involved discussion of criminal activity, for reasons I have explained in the last paragraph. I would add that I have considered the decision of the Court of Appeal in **Pearce**. I consider that the panel properly applied that decision, since it made a positive finding on the key issue which it took into account in assessing his risk. **Pearce** does not require a panel to make positive findings about every suspicion the panel may have. I have not found it necessary to await the decision of the Supreme Court in **Pearce**.

30. Assessment of the Applicant. Contrary to the argument put forward on the Applicant's behalf, I consider it plain from the paragraphs of the panel's decision which I have quoted above that it applied its mind to the position of the Applicant and made its decision having regard to the particular risk posed by the Applicant.

31. For these reasons I do not accept that there was any error of law or fact on the part of the panel. It follows that the application to set aside its decision cannot succeed.

Decision

32. For the reasons I have given I am satisfied that the application should be dismissed.

David Richardson
18 January 2023