

[2022] PBSA 17

Application for Set Aside by the Secretary of State for Justice in the case of Perks

Application

1. This is an application by the Secretary of State for Justice (the Applicant) to set aside the decision made by an oral hearing panel (the panel) dated 13 November 2022 to direct the release of Perks (the Respondent).
2. I have considered the application on the papers. These are the dossier of 188 pages, which included the oral hearing decision letter and the application for set aside, which was completed on a Stakeholder Response Form dated 16 November 2022.

Background

3. On 27 April 2021, the Respondent received a total determinate sentence of 22 months' imprisonment following conviction for dangerous driving, driving whilst disqualified and breach of a suspended sentence. His sentence expires on 26 February 2023.
4. The index offending involved the Respondent driving his partner's car when he was disqualified from doing so and then driving dangerously, including high speeds, when the police tried to stop the vehicle. The vehicle ended up in a collision and the Respondent ran away. The offences put him in breach of a suspended sentence which he had received for possession of cannabis and a sim card in a prison cell in 2019.
5. The Respondent has previous convictions including a s20 grievous bodily harm, threatening behaviour, affray and possession of weapons. He was aged 31 at the time of sentencing. He is now 32 years old.

Application to Set Aside

6. The application to set aside is dated 16 November 2022 and has been drafted and submitted by the Public Protection Casework Section acting on behalf of the Applicant.
7. The application to set aside relates to security information. Some of the information was not available to the panel as the Community Offender Manager (COM) was not aware of its existence and some was not available as it occurred after the oral hearing took place. In essence, therefore, the Applicant relies on there being both



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new information and a change in circumstances as the basis for the submission that the decision should be set aside.

Current Parole Review

8. On 31 January 2022, the Respondent was released earlier than the automatic release point in his sentence by the Secretary of State on a licence with specified curfews. His licence was revoked and he was recalled to custody on 15 March 2021 as a result of aggressive behaviour which had led to him losing his place at the designated accommodation.
9. The Respondent's case was referred to the Parole Board by the Secretary of State to consider whether it would be appropriate to direct his re-release following the revocation of his licence.
10. A member of the Parole Board considered the Respondent's case on 17 May 2022 and directed his case to an oral hearing. This was the first review of his case following the recall. The case proceeded to an oral hearing on 7 November 2022 before a two member panel. The Respondent was not legally represented. Oral evidence was given by the Respondent's Prison Offender Manager (POM) and (COM).
11. Following the oral hearing, further information was received by the panel, namely a map of the intended exclusion zone and a security report dated 21 October 2022 which had been discussed in the hearing. The panel directed the Respondent's release.

The Relevant Law

12. 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.
13. 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)).
14. 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 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
 - i) information that was not available to the Board when the direction was given had been so available, or
 - ii) a change in circumstances relating to the prisoner after the direction was given, had occurred before it was given.

15. Under Rule 28A(5) an application to set aside a decision must be made within 21 days of the decision. However, if the application relies on 28A(4)(b) i.e it relates to new information or a change in circumstances then it must be made before the prisoner is released.

The Reply from the Respondent

16. In accordance with the rules, the Respondent was asked if he had any representations to make within seven days. The Respondent did not submit any response.

Discussion

Eligibility

17. The application concerns a panel's decision to direct release following an oral hearing under rule 25(1)(a). The application was made prior to the Respondent's release and argues that the condition in rule 28A(4)(b)(ii) is made out. It is therefore an eligible decision which falls within the scope of rule 28A.

New information and/or a change in circumstances and the test for setting aside

18. The Applicant relies on information received from the COM who had been provided with an updated security report from the POM. The COM reported that they had not been aware of all of the information in the security report at the time of the oral hearing. The COM said that, at the hearing, only 7 of the 42 entries on the security report had been discussed. There had also been 7 new entries since the hearing, all of which were related to drugs. The COM stated, with regards to the security report:

"I think it necessary and appropriate for this report to be shared with the Parole Board and for any release plans to be paused. In the Oral Hearing, the small number of issues around his behaviour were discussed and placed within the context of deteriorating mental health over a short timeframe. As such were more isolated incidents prior to commencing appropriate medication. However, the full report details consistent and prolonged negative behaviour, threats to staff and inmates and suggests that [the Respondent] may continue to be involved with drugs misuse, drug supply, violence to other inmates and in possession of mobile phones. All of which are concerning and affect risk of serious harm and re-offending.

Based on this additional information I do have concerns as to whether the proposed risk management plan is sufficient to manage his risk if released; moreover, it does raise questions about [the Respondent's] own motivation and commitment to desistance and compliance with any licence."

19. The Applicant submits that this new information constitutes a change in circumstances and, as such, the decision to release ought to be set aside and a full re-examination of the case take place.

20. I have seen the security report which the panel had sight of prior to the decision being issued. It is dated 21 October 2022 and contains 28 entries, the last one being on 20 October 2022. The panel's decision states that the actual report was received after the hearing, but it was "*referred to during the hearing*" (see decision front sheet). Certainly, particular entries were discussed as they are specifically mentioned in paragraphs 2.6 and 2.7 of the decision. I cannot be sure that only 7 entries were discussed or highlighted to the panel as stated in the application, but it is clear that the panel had a printout of more entries than that by the time the decision was made. These therefore cannot amount to new information.
21. There are 5 entries between the 20 October 2022 and the oral hearing date. It is not clear that the panel were aware of these as they are not mentioned in the decision. I can safely infer from the application that the Applicant's position is that they were not discussed. However, they do not differ in type of concern to those already available to the panel and are all low grading in terms of reliability. I therefore do not consider these to be sufficient to satisfy Rule 28A(4)(b)(i). I am not satisfied that these few entries as described meet the high bar of saying that the decision to release would not have been made had this information been available to the panel.
22. I therefore need to look at the entries post hearing and whether they could amount to a change of circumstances. As highlighted in the application, there are 7 security entries post hearing from 8 November through to 14 November 2022. All have been given a high reliability grading. 6 entries relate to drugs, with 3 for being 'under the influence'.
23. It is significant that these are drug related entries. As noted above, the panel was aware there had been recent entries relating to bullying and threats etc. However, it is apparent that the panel was not aware of recent concerns about use of drugs. The panel stated in paragraph 2.6 that there had been "*no suspicion of drug misuse*" since April 2022. The panel had identified within section 1 of its decision that drug misuse was a risk factor and described concerns about the Respondent being involved in drug supply. The Respondent himself had highlighted drug misuse as one of his main risk factors when talking to the panel. The Respondent had also said that he wanted to be drug tested on a weekly basis in the community to show that he remains 'clean' (paragraph 3.6 of the decision). I am satisfied therefore that the recent high graded security entries constituted a change in circumstances which occurred after the decision was made. I am further satisfied that the direction for release would not have been given if the concerns had been raised before that direction was given and so Rule 28A(4)(b)(ii) is met.
24. In addition to the above, although not specifically raised by the Applicant, it is clear to me that the panel placed reliance on the evidence from the POM and COM as stated in the panel's conclusion. It appears from the Application that the COM had not been made fully aware of the security information. I make no comment as to how that happened but I note that the panel rely on updated information given in oral evidence as inevitably the reports in the dossier cannot all be perfectly up to date. The COM is now submitting that their evidence, in particular their analysis of the reasons for outbursts and threatening behaviour, would have been different had they known the full information. Although I have not needed to determine this on this occasion, this may well have satisfied Rule 28A(4)(b)(i).

25. Having decided that the panel's decision to direct release would have been affected, I must also consider whether it is in the interests of justice for its decision to be set aside. Having considered the information, I am satisfied that it is in the interests of justice for the panel's decision to be set aside. In my opinion, the interests of justice would not be served if the release of a prisoner took place in the knowledge he had been suspected of drug misuse after a direction for release had been given, which was a decision based on information that he had not been suspected of such use for almost seven months, and when drug misuse was a key risk factor in relation to further offending and the causing of serious harm.

Decision

26. For the reasons I have given, the application is granted, and the final decision of the panel dated 13 November 2022 should be set aside.

27. I must now consider two matters under rule 28A(8). First, whether the case should be decided by the previous panel or a new panel and second, whether it should be decided on the papers or at an oral hearing.

28. The previous panel has the great benefit of having prepared and heard the case, carefully considering the evidence before it at the time, reaching and documenting its decision. It is best placed to consider the case again, and I direct that it does so. On the evidence before me, I direct that the case should be decided on the papers, unless the panel considers that an oral hearing would be preferable, in which case it may set its own directions after the case has been remitted back to it for further consideration.

Cassie Williams
14 December 2022