

[2022] PBSA 20

Application for Set Aside by the Secretary of State for Justice in the case of Walker (No.2)

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 dated 17 October 2022 to direct the release of Walker (the Respondent).
2. I have considered the application on the papers. These are the oral hearing decision, the dossier, the application for set aside (6 December 2022), and an addendum security intelligence report (7 December 2022).

Background

3. The Respondent received a determinate sentence of four years and six months in custody on 11 March 2019 for robbery. He also received a consecutive 12-month sentence for aggravated vehicle taking. He pleaded guilty to both offences. His sentence expires in August 2024.
4. The Respondent was aged 23 at the time of sentencing. He is now 27 years old.
5. The Respondent was automatically released on licence on 12 November 2021. His licence was revoked just over one month later on 17 December 2021, and he was returned to custody on the following day.

Application for Set Aside

6. The application for set aside has been drafted and submitted by the Public Protection Casework Section (PPCS) acting on behalf of the Applicant.
7. The application for set aside submits further information which, it is argued, constitutes a significant change in circumstances which impacts the risk management, and which came to light after the panel made its decision.

Current Parole Review

8. The Respondent's case was referred to the Parole Board by the Applicant to consider whether to direct his release.



9. The case proceeded to an oral hearing on 6 October 2022 before a three-member panel comprised of two independent members and a judicial chair. The Respondent was legally represented throughout the hearing. Oral evidence was given by the Respondent's Prisoner Offender Manager (POM) and his Community Offender Manager (COM). The panel directed the Respondent's release.
10. The Respondent's provisional release date was 17 November 2022.
11. This case has already been the subject of a set-aside application (**Walker [2022] PBSA 13**) which I dismissed. This decision was issued on 1 December 2022. On 5 December 2022, the Applicant again suspended the Respondent's release on the basis that there was yet further risk related evidence to be submitted to the Parole Board. That evidence forms the basis of the present application.

The Relevant Law

12. Rule 28A(1) 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(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) and 28A(2). 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(4)(a)) **and** either (rule 28A(5)):
- 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 made if information that had not been available to the Board had been available, or
 - c) a direction for release would not have been made 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

15. Submissions drafted by the Respondent's legal representative set out the Respondent's position. These note that the Respondent admitted to "empty threats" towards staff prior to receiving the outcome of the last set aside application and express the Respondent's hope that the Parole Board will provide an opportunity for release.

Discussion

Eligibility

16. 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 being released and argues that the condition in rule 28A(5)(b)(ii) is made out. It is therefore an eligible decision which falls within the scope of rule 28A.
17. This application is unusual in that it is the second application for set aside of the release decision. A careful reading of rule 28A shows that this is permissible. There is nothing to prevent a party from making more than one application if there is a legitimate basis on which it may do so. If there are ongoing serious risk-related concerns prior to release being effected, then it is right there should be a means for them to be raised even if a previous application for set-aside has been refused.
18. However, it seems to me that, as a matter of principle, the same or similar concerns should not repeatedly be used in a way that would effectively block a prisoner's release on an ongoing basis simply because an earlier set aside decision is unpalatable, or a party wants 'another bite of the cherry'.
19. In addition, it would seem unfair to me if a follow-up application relied on matters which were known at the time a previously refused application was submitted. Any set aside application should set out all relevant information at the time that it is made.
20. That said, any changes to the Parole Board Rules or policy will need to be made elsewhere: unless and until that happens, the current position is very clear. Rule 28A permits multiple applications and therefore I am bound to treat this second application on its merits.

Change in circumstances

21. The application notes that, after the decision in the first set-aside application was issued, PPCS received information from the Respondent's COM on 2 December 2022 which stated that the Respondent had (again) been discovered under the influence of a new psychoactive substance ('Spice'). In addition, there had been three incidents of alleged violence and threats to staff which are currently pending adjudication.
22. The application sets out further details of the alleged violence all of which is said to have taken place on 1 December 2022. The allegations are of threats to assault staff, attempted assault, and threats of criminal damage to a prison officer's vehicle. The Respondent accepts he made "empty threats".
23. The addendum security report provides further detail to the matters detailed in the application.

The test for set aside

24. In determining the application for set aside, I must consider whether the events described above would have affected the panel's decision to direct the Respondent's release.
25. For the same reasons that I advanced in dismissing the last application, it is unlikely that the Respondent simply being found under the influence again would have constituted a change in circumstances. Although the application notes that the COM suggests there has been a "disconnect between [the COM] and [my] understanding in relation to [the Respondent's] drug misuse" any such perceived disconnect is irrelevant.
26. I am not bound to follow the COM's view, neither am I required to connect with their understanding in making any decision. To be very clear, even if I were to accept that being found under the influence was a change of circumstances for the purposes of rule 28A, I would most likely still not be satisfied that the direction for release would not have been given for the reasons set out in dismissing the first application.
27. However, there are now new allegations of violence. The panel, in making its decision, primarily focussed on drug misuse as the key risk factor but did assess the Respondent as presenting a medium risk of violent reoffending (including in the context of relationships). He is also assessed as presenting a high risk of serious harm to the public.
28. I am satisfied that the pending adjudications for threatening and violent behaviour amount to a change in circumstances for the purposes of rule 28A.
29. The Applicant makes no further submissions in response to the remainder of the test.
30. I must go on to consider whether the direction for release would not have been given if the events detailed in the application had taken place before that direction was given.
31. I am satisfied that is the case. It is difficult to see a situation in which a panel would direct the release of a prisoner who had three pending adjudications in respect of alleged threats and violence at the time of the hearing.
32. Having decided that panel's decision to direct release would have been affected, I must finally consider whether it is in the interests of justice for its decision to be set aside.
33. I am satisfied that it is in the interests of justice for the panel's decision to be set aside. The interests of justice would not be served if the release of a prisoner with a history of violent offending and threatening behaviour took place in the knowledge that this was, in fact, a live issue that had previously appeared to be in abeyance in custody.

Decision

34. For the reasons I have given, the application is granted, and the final decision of the panel dated 17 October 2022 should be set aside.
35. I must now consider two matters under rule 28A(9). 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.
36. 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.
37. I have also considered whether an oral hearing is necessary considering the principles in **Osborn v Parole Board [2013] UKSC 61**. The matters which are pending adjudication have been accepted by the Respondent and are clearly set out in the application. The Respondent has had the opportunity to state his position in relation to those matters. In all the circumstances, I consider the current panel would have sufficient information to decide the case on the papers and make directions accordingly.

Directions

38. The following directions are now made:

- (a) The paper review should take place at the earliest possible opportunity subject to availability of panel members and the completion of the directions below.
- (b) It should be undertaken by the same panel that convened on 17 October 2022.
- (c) The panel should be told that its previous decision has been set aside but not made aware of the reasons why it was set aside.
- (d) The panel should be advised that this is a complete re-hearing.
- (e) The addendum security information and adjudication paperwork must be added to the dossier.
- (f) A brief updated PAROM addendum report is directed by 6 January 2023. This should include the status of the matters pending adjudication.
- (g) The Respondent's legal representative is invited to make any further representations directly to the panel by 10 January 2023.

Stefan Fafinski
21 December 2022