

[2023] PBSA 26**Application for Set Aside by the Secretary of State for Justice
in the case of Green****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 20 March 2023 to direct the release of Green (the Respondent).
2. I have considered the application on the papers. These are the dossier of 455 pages, which included the oral hearing decision reasons, the application for set aside and the response to the application completed by the Respondent's legal representative.

Background

3. On 7 October 2020, the Respondent received a determinate sentence of four years' imprisonment following a conviction for robbery. His sentence expires in March 2024.
4. The index offence involved the Respondent, when under the influence of drugs, robbing a man in a shop. The Respondent used a Stanley knife to threaten the victim.
5. The Respondent has previous convictions, including for other robberies. He was aged 28 at the time of sentencing. He is now 30 years old.

Application to Set Aside

6. The application to set aside is dated 17 April 2023 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 custodial behaviour following the decision to direct the Respondent's release, specifically two allegations of assault. In essence, therefore, the Applicant relies on there being both new information and a change in circumstances as the basis for the submission that the decision should be set aside.

Current Parole Review

8. This was the Respondent's first review following his recall.



9. On 4 March 2022, the Respondent was released at the automatic release point in his sentence as is required by the law. His licence was revoked and he was recalled to custody on 18 March 2022 as a result of losing his place in his designated accommodation due to breaking the rules there.
10. 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.
11. A member of the Parole Board considered the Respondent's case on 31 May 2022 and directed his case to an oral hearing. The initial listing of the case on 3 March 2023 had to be adjourned due to the non-attendance of a witness. The case then proceeded to an oral hearing on 20 March 2023 before a single member panel. The Respondent was legally represented. Oral evidence was given by the Respondent's Prison Offender Manager (POM), his Community Offender Manager (COM) and a Mental Health practitioner.
12. The panel directed the Respondent's 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 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.
16. 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




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17. The Respondent, through his legal representative, provided a response to the allegations and application. This was by way of written representations dated 21 April 2023. The Respondent's submissions are outlined and addressed in more detail below however, the thrust of the submissions are that, although there has been a change in circumstances, it would not have affected the decision made by the panel to release the Respondent.

Discussion

Eligibility

18. 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

19. The Applicant relies on information received from the POM which details that the Respondent was implicated in two assaults involving separate prisoners. It is alleged that, on Friday 14 April 2023, the Respondent assaulted another prisoner and did so because that prisoner was transgender. It is then alleged that, on the following day, whilst in the adjudication holding room, the Respondent "delivered a kick" to another prisoner which led to a fight between them and force needing to be used to separate them. The POM explained that both incidents were captured on CCTV and the Respondent was being held in the segregation unit at the time the information was shared.

20. The Applicant includes in the application that the COM now has concerns managing the Respondent's risk in the community and would need to reassess his suitability for the designated accommodation.

21. 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.

22. The Respondent in his submissions disputes the allegations of assault however, he then goes on to make certain admissions in relation to the second alleged assault and does not specifically address the first incident, other than to say it did not arise due to the prisoner being transgender. The Respondent admits he kicked another prisoner on 15 April 2023 following a verbal dispute. He submits that he regrets his actions on both days (thereby implying that he accepts there was an incident on 14 April 2023 involving him). He concedes that he went to the segregation unit and therefore there was a change a circumstances but argues that, had this been known by the panel, it would not have affected the outcome.

23. The Respondent submits there is no indication that the incidents resulted in any harm or injury being caused "thus it cannot be surmised that [the Respondent's] actions have caused serious harm or in fact amount to an escala-



tion of risk not already present when the Decision was made". He further submits that the case was considered very carefully by the panel and the *"alleged fights"* would not have affected the decision the panel made.

24. In relation to the Applicant's comments from the COM, the Respondent submits that his legal representative spoke with his COM on 20 April 2023 *"and she remains content that the current risk management plan is robust enough to manage [the Respondent's] risks"*.
25. Having considered the information, it is apparent that following the decision being made by the panel, there have been two allegations of violence, one said to have needed the involvement of force to prevent it continuing and then resulting in the Respondent being placed in segregation. It seems clear to me that this easily meets the requirements for a change in circumstances. The main issue for me therefore is whether a direction for release would not have been given if the change in circumstances had occurred before it was given.
26. In order to consider this, I must look at the information the panel had and the reasons it gave for its decision. It is important to note that the panel identified risk factors in paragraph 1.5 of its decision which included poor consequential thinking skills and problem solving skills. The panel considered the Respondent's custodial behaviour since his recall which did include three proven adjudications, although none of them were for assaults or fighting. The panel commented in its decision at paragraph 4.2 that *"although his behaviour since recall has not been without incident, there is nothing to indicate any use of significant violence"*. The Respondent relies on that comment from the panel when submitting that the allegations now made *"do not amount to a significant use of violence"*. Although that is slightly different wording to that used by the panel and therefore may be interpreted differently, I am of the opinion that the evidence provided could amount to either. Firstly, the allegations involve more than one occasion of the use of violence in a short period of time and could amount to 'significant use'. Secondly, although the first incident is not described in detail, the second involves the use of a kick and then the need to use force to separate the two people involved. This could clearly be interpreted as an allegation of the use of significant violence. The Respondent denies he instigated the fight, but admits he used violence first (following a verbal altercation). Given he admits he should not have retaliated or risen to the taunts of others, he is not saying that the kick was in self-defence. These incidents occurred after he was aware he was to be released and after a hearing where there had been discussion about his consequential thinking skills and the panel observed a tendency for him to blame others *"although it is clear that he has the capacity to manage himself if he thinks through the consequences of his actions"* (paragraph 2.9). On the Respondent's own admission he did not manage himself on either of these occasions.
27. Whilst the Respondent argues that there is nothing in the application to say that the incidents actually caused serious harm and I have not been told of injuries caused, it is the risk of such harm which is important. Use of a kick must bring with it such a risk. Use of violence and a suspicion that such violence was used due to the other person being transgender must also give rise to the risk of both physical and psychological harm.



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28. There is nothing in the decision to say that the risk to transgender individuals had been considered previously and that his attitudes and beliefs regarding this had been explored. It is apparent to me that this was not identified as an area of risk by witnesses or the panel as there was no evidence of it before. Now there is such evidence, and, although it is denied by the Respondent, I am certain that the panel would at least want to explore the incident to satisfy itself that there was not a heightened risk to a particular group, particularly living in designated accommodation which may house transgender people.
29. Therefore, not only does the new information provide evidence to suggest the Respondent is continuing to display active risk factors identified by the panel, it also raises the concern that there may be other risk factors which had not yet been identified by the panel.
30. Consequently, from my reading of the panel's decision, I am satisfied that 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. 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. The Respondent submits that it would not be fair to set the decision aside. However, 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 accused of two incidents of violence after a direction for release had been given and within days of his impending release (his accommodation was available from 17 April 2023), which was a decision based on information that he had not used direct violence in custody and he had the ability to manage himself.

Decision

32. For the reasons I have given, the application is granted, and the final decision of the panel dated 20 March 2023 should be set aside.
33. 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.
34. The previous panel has the great benefit of having prepared and heard the case, carefully considering the evidence before it at the time, then 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
02 May 2023