

[2023] PBSA 34

Consideration of Set Aside in the case of Thomas

Application

1. The set aside process was initiated by the Parole Board Chair under rule 28A(1)(b) of the Parole Board Rules 2019 (as amended) on 31 May 2023. It falls to me to decide whether to set aside the decision made by an oral hearing panel (the **Panel**) dated 25 April 2023 to direct the release of Thomas (the **Prisoner**). This is an eligible decision.
2. I have considered the application on the papers. These are the dossier, the oral hearing decision, a stakeholder response form (**SHRF**) dated 31 May 2023, a letter from a consultant forensic psychiatrist dated 26 May 2023, and an undated note from the panel chair.

Background

3. On 19 August 2005, the Prisoner received sentence of imprisonment for public protection (IPP) following conviction on two counts of possession of an imitation firearm with intent to cause fear of violence. His tariff was set at 35 months and expired in July 2008.
4. The Prisoner was aged 36 at the time of sentencing. He is now 54 years old.

Current Parole Review

5. The Prisoner's case was referred to the Parole Board by the Secretary of State to consider whether to direct his release.
6. An oral hearing took place on 19 April 2023 before a three-member panel, including a specialist psychiatrist member. At that time, the Prisoner was detained in hospital under section 47/49 of the Mental Health Act 1983. It was a hybrid hearing, with the panel and some witnesses present with the Prisoner and others attending remotely via videoconference.
7. Oral evidence was taken from the Prisoner, his responsible clinician, a community psychiatrist, a psychologist, a social worker, a care-coordinator, a representative from the accommodation to which the Prisoner had overnight leaves (Location A), a personal assistant, and his Community Offender Manager (**COM**). The Prisoner was legally represented throughout proceedings.
8. The panel directed the Prisoner's release.



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



[@Parole_Board](https://twitter.com/Parole_Board)



0203 880 0885

9. In doing so, it noted that the Prisoner had undertaken a years' worth of overnight leave to Location A. This comprises a cluster of self-contained flats with staff support from 8am to 8pm, 24 hour security and an allocated keyworker.

10. As the Prisoner was serving an IPP sentence, the panel's decision was provisional for 21 days to allow either party to make an application for reconsideration. No such application having been received, the panel's decision became final on 18 May 2023.

11. The Parole Board received a SHRF from the Public Protection Casework Section (**PPCS**) on behalf of the Secretary of State dated 31 May 2023. This SHRF set out the following:

- a) On 15 May 2023, the COM advised PPCS that release to Location A was planned for 19 May 2023. This would be a temporary arrangement until funding had been agreed for an alternative property (Location B). The Location B property had been assessed as suitable by the Probation Service. The COM considered that release to Location B would strengthen the risk management plan as it had 24 hour support cover (rather than the 12 hour cover at Location A).
- b) On 18 May 2023, the COM advised PPCS that the Probation Service considered that the Prisoner should be released directly to Location B and that release would take place once the accommodation was available.
- c) On 25 May 2023, the COM advised PPCS that release would take place on 5 June 2023.
- d) On 26 May 2023, a consultant forensic psychiatrist from the hospital took the unusual step of contacting the Parole Board panel chair directly. Her letter included minutes of a professionals meeting dated 19 May 2023 and two emails relating to the revised plan for release. She raised concerns about the new release plan and noted that the care team at the hospital opposed the change in release accommodation. She pointed out that the potential alternative was not considered in any great depth at the hearing and that, in the hospital's opinion, release to Location B would weaken the risk management plan rather than strengthening it.
- e) PPCS sought clarification from the panel chair on whether he was satisfied with the proposal to release the Prisoner to Location B.

12. The panel chair notes the following:

- a) There was a brief discussion at the hearing about an alternative placement to Location B, but at the time of the hearing, this was a pending assessment.
- b) A move to Location B would take the Prisoner away from the area in which he had undertaken his overnight leaves and potentially isolate him from the protective factors he had developed while on overnight leave.

- c) It was unclear what mental health support the Prisoner would receive if released to Location B.

The Relevant Law

13. Rule 28A(1)(a) of 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(1)(b), 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 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)).
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 (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 parties

16. Legal representations on behalf of the Prisoner seek release on the basis that the new risk management plan is stronger than that considered at the hearing.
17. Legal representations on behalf of the Secretary of State ask the panel chair to consider the new proposed risk management plan (noting the view of the Probation Service that it is sufficient to manage the risk posed by the Prisoner) and request that the original release decision remain in place.

Discussion

18. The first question that must be answered is whether there is new information that was not available to the panel when the direction for release was given.
19. It is clear that there is. The discussion at the oral hearing was predicated on the Prisoner being released to Location A. New information clearly shows that there is no prospect of the Prisoner being released there.
20. The next question is whether the panel would not have given a direction for release if that information had been available to it.

21. I find that to be so. The panel's decision was founded on a risk management plan which involved release to Location A rather than Location B. While Location B appears to have been mentioned in passing in the hearing, it was not considered in any depth.

22. Finally, I must consider whether setting aside the panel's decision is in the interests of justice. I find that it is. The interests of justice would not be served in releasing a high-risk prisoner to accommodation that had not been considered properly by the releasing panel. It is not a matter on which the Probation Service should be taking unilateral action. Doing so would undermine the accountability of the Parole Board for the public protection decisions it is empowered to take by statute. Moreover, it is a decision so significant that the panel should be able to test the new risk management plan via further oral evidence and not simply on the basis of correspondence.

23. I therefore conclude that all elements required for the decision to be set aside are made out.

Decision

24. For the reasons I have given, the application is granted, and direct that the decision of the panel dated 25 April 2023 is set aside.

25. 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.

26. The previous panel has the great benefit of having prepared 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.

27. I have also considered whether an oral hearing is necessary considering the principles in **Osborn v Parole Board [2013] UKSC 61**. In fairness to the Prisoner, I direct the matter to a fresh hearing.

Stefan Fafinski
19 June 2023