

[2024] PBSA 39

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

Application

1. This is an application by the Secretary of State for Justice (the Applicant) to set aside the decision to direct the release of Barton (the Respondent). The decision was made by a panel following an oral hearing. This is an eligible decision.
2. I have considered the application on the papers. These are the dossier (271 pages), the decision (dated 14 May 2024), and the application for set aside (dated 18 June 2024).

Background

3. On 17 November 2017, the Respondent received three concurrent extended sentences for offenders of particular concern comprising imprisonment for nine years with a one year extended licence period following conviction after trial on three counts of assault of a female child under 13 (with penetration). On the same occasion, he received a concurrent six year determinate sentence for causing/inciting a girl under 13 to engage in sexual activity (with penetration), a further concurrent six year determinate sentence for causing/inciting a girl under 13 to engage in sexual activity (no penetration) and two concurrent five year determinate sentences for sexual assault of a female child under 13.
4. The Respondent's parole eligibility date passed in April 2022; his conditional release date is in October 2026 and his sentence expires in October 2027.
5. The Respondent was aged 28 at the time of sentencing. He is now 34 years old.

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 there is further information constituting a significant change in circumstances which came to light after the panel made its decision. It is argued that the panel would not have reached the same decision had this new information been known.
8. The content of the application will be considered in the **Discussion** section below.

Current Parole Review

9. The Respondent's case was referred to the Parole Board by the Applicant to consider whether or not it would be appropriate to direct his release.
10. The case proceeded to an oral hearing on 30 April 2024 before a two-member panel. The Respondent was legally represented throughout the hearing. The Applicant was not legally represented. The panel heard oral evidence from the Respondent, a stand-in Prison Offender Manager (POM) and his Community Offender Manager (COM). The panel directed the Respondent's release.

The Relevant Law

11. Rule 28A(1)(a) of the Parole Board Rules 2019 (as amended) 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.
12. 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)).
13. 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 Respondent

14. The Respondent has submitted a statement in response to the application which will be considered in the **Discussion** section below.

Discussion

15. On 30 May 2024, the Applicant was notified by the Respondent's establishment and the POM that the Respondent had been returned from open conditions to closed conditions following an incident that is said to have occurred on 26 May 2024.
16. It is reported that the Respondent was caught on CCTV in an out of bounds area where he appeared to have been looking for a package before giving up the search. When challenged, the Respondent reportedly told staff that he knew there was a package of steroids and tobacco, so he went to look for it in order to "*beat a certain*

prisoner to it". The Respondent has said that his intention was to hand it in to staff. He was one of three prisoners caught and consequently returned to closed conditions.

17. The COM is concerned that the Respondent has shown risk-taking behaviour of a completely different nature to his previous risks; that his openness and honesty is called into question; and that the Respondent may have been part of larger group-organised illicit activity.
18. It is argued that the release decision was heavily weighted on the robustness of external controls and that the incident shows that, in the view of the Probation Service, the Respondent cannot be managed under the directed risk management plan.
19. Legal representations on behalf of the Respondent state that the Respondent vehemently denies being involved in group organised activity. His account is that his cellmate was being threatened by three other prisoners into bringing a parcel into prison on their behalf. The Respondent says he approached these three prisoners and advised them to leave his cellmate alone or that they would be reported. The three prisoners persisted, and the Respondent says he went to look for prison staff to report matters. However, there were no staff around as it was a Sunday, and the Respondent was also working. He says he never knew of any areas that were out of bounds. Since he could not find any staff, he set out to find the parcel so he could either report its location to staff or pick it up and return it to staff.
20. It is noted that the information was known during the reconsideration window but not submitted to the Parole Board. However, the new information would not have given any sustainable route to challenge the release decision under rule 28; the only option to the Applicant under these particular circumstances was to wait for the reconsideration window to close and then initiate an application for set aside (the criteria for which are different).
21. It is further noted that the Respondent has not been adjudicated in respect of any of the matters which led to his return to closed conditions; neither has he had the opportunity to discuss the matters with his POM or COM. There is no evidence from the Applicant to suggest that any such adjudication has taken place, and the opportunity to bring any such adjudication would have time-expired by now.
22. It is argued that the suggestion that the Respondent is engaged in a large scale enterprise to smuggle contraband into the prison estate is "*utter nonsense*". I agree. There is no evidence before me, either in the dossier or the application for set aside to suggest that this is anything more than speculation and conjecture.
23. Although there is some evidence to suggest that the Respondent made a poor decision, I am not satisfied that the Applicant has established that there has been an increase in risk. The allegations set out in the application are unadjudicated. The Applicant cannot fairly conclude on the evidence available that the Respondent is engaged in some form of conspiracy to bring contraband into the estate, nor that there is any increase in the risk of sexual reoffending that would have been paramount in the panel's mind when making its decision to release the Respondent.

Moreover, while the Applicant may well have not found the Respondent's account to be believable, there is equally no meaningful evidence to say that it is not believable; neither does it significantly indicate a lack of openness or honesty, particularly if the Respondent was, in fact, first seeking out prison staff before making the (admittedly poor) decision to look for the suspected package due to such staff being unavailable. Ultimately there is nothing arising from this incident that leads me to believe that the risk management plan, albeit heavily reliant on external controls, would not manage the Respondent's risk of sexual reoffending.

24. In conclusion, there is insufficient evidence of increased risk for me to find that the panel would have made a different decision had it known of the currently available information relating to the Respondent's return to closed conditions.

Decision

25. For the reasons I have given, the application is refused.

Stefan Fafinski
01 July 2024