

[2023] PBSA 14

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

Application

1. This is an application by the Secretary of State for Justice (the Applicant) to set aside the decision made on the papers by a panel (dated 10 December 2022) to direct the release of Wharton (the Respondent).
2. I have considered the application on the papers. These are the oral hearing decision, the dossier, and the application for set aside (dated 3 March 2023). I have also seen screenshots of a text message exchange (undated) and a photograph of a three-inch lock knife (dated 20 January 2023).

Background

3. The Respondent received a sentence of ten years imprisonment on 15 January 2016 following conviction for causing grievous bodily harm with intent to do grievous bodily harm, to which he pleaded not guilty. He also received a concurrent two year sentence following conviction for possessing an offensive weapon in a public place, to which he also pleaded not guilty. Both offences were committed while the Respondent was on bail.
4. The Respondent was further convicted on 23 June 2020 for assault by beating of an emergency worker and received a four week consecutive sentence.
5. He was automatically released on licence in December 2020. His licence was revoked in January 2021, and he was unlawfully at large for over two months before being returned to custody. He was re-released (following an oral hearing) in March 2022 but recalled two weeks later.
6. His sentence expires in November 2025.
7. The Respondent was aged 19 at the time of sentencing. He is now 25 years old.

Application for Set Aside

8. The application for set aside has been drafted and submitted by the Public Protection Casework Section (PPCS) acting on behalf of the Applicant.



9. The application for set aside submits further information which came to light after the panel made its decision. It is argued that the panel may not have reached the same decision had this new information been known.

10. The content of the application will be considered in the **Discussion** section below.

Current Parole Review

11. The Respondent's case was referred to the Parole Board by the Applicant to consider whether to direct his release. This is the Respondent's first parole review since his second recall.

12. The case was considered on the papers on 10 December 2022 by a single-member panel. This panel found insufficient evidence to conclude that the recall was appropriate and directed the Respondent's release.

The Relevant Law

13. Rule 28A(1)(a) 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(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 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 (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

16. Submissions dated 17 March 2023 drafted by the Respondent's legal representative set out the Respondent's position. These will be considered in the **Discussion** section below.

Discussion

Eligibility

17. The application concerns a panel's decision to direct release following a paper decision under rule 19(1)(a). The application was made prior to the Respondent being released 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/change in circumstances

18. The application notes the following allegations:

- a) On the evening after the Respondent was notified of the release direction, he sent a thread of threatening text messages to the new partner of his ex-partner. These included a photograph of an improvised weapon. The messages also suggested that the Respondent knew his ex-partner's new address and had someone watching her and her new partner.
- b) A cell search did not find a mobile phone but did uncover a three-inch lock knife.

19. The matters have been referred to police.

20. In consequence of the above, the Applicant submits that the release decision should be set aside.

21. I note that the Respondent had not had an opportunity to give instructions to his legal representative. However, no extension to time was requested. The Respondent's position (through his legal representative) is that he would deny being in possession of any weapon and would further deny sending any inappropriate text messages.

22. I have carefully reviewed the text messages and am satisfied that they are evidence of significant threats sent to the new partner of the Respondent's ex-partner. I need not repeat them in their entirety here, but the following messages give a flavour of the overall tone of the conversation:

- a) *"Manz out in march 13th you're a dead man walking"*
- b) *"I'm out on 13th of march your getting your neck sliced"*
- c) *"When I'm out I'm ending you for good then she will be all mine....I've got your address I'm coming for you"*
- d) *"Screws won't find my shank or phone"*
- e) *"Where was you and [ex partner] yesterday at 4.34 did you leave uoir House and go shop...thought so"*
- f) *"I hope this girl is worth it losing your life for"*

23. One message contains an image of an improvised weapon which appears to be a craft blade taped to the handle of something like a toothbrush or a carpenter's pencil.

24. The image of the item found in the Respondent's cell search self-evidently shows a three-inch lock knife.
25. While the Respondent will deny the allegations, I conclude on the evidence before me that the panel would not have given a direction for release if that evidence had been before it at the time. It is very difficult for me to see a situation in which any panel that considered releasing a prisoner with a history of violent offending and non-compliance including the use of weapons would have done so in the face of *prima facie* evidence of threats to kill and the discovery of a weapon in the Respondent's cell.
26. Having decided that the 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.
27. I am satisfied that it is in the interests of justice for the panel's decision to be set aside. While an ongoing investigation is not, in itself a bar to release, the allegations are such that in the interests of justice the decision must be set aside. In this case, allegations of serious violent risk-related behaviour have arisen after release had been directed. It would not be in the interests of justice or the interests of public protection for the decision to stand.

Decision

28. For the reasons I have given, the application is granted, and the decision of the panel dated 10 December 2022 should be set aside.

Stefan Fafinski
23 March 2023