

[2023] PBSA 45

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

Application

1. This is an application by the Secretary of State (the Applicant) to set aside the decision by a Panel of the Parole Board (the Panel) to direct Portman's (the Respondent's) release following an oral hearing.
2. I have considered the application on the papers. These are the dossier currently comprising 332 pages, the oral hearing decision dated 5 April 2023, the outcome of two applications for non-disclosure relating to this application and the application to set aside dated 10 May 2023.

Background

3. The Respondent received a determinate sentence of imprisonment of 90 months for the offence of wounding with intent to do grievous bodily harm. His sentence will expire in September 2025. He was released automatically on 24 December 2021. His licence was revoked on 15 August 2022, and he was returned to custody the next day. The reason for the recall related to allegations that the Respondent had assaulted his partner, and he was arrested for common assault. The allegations were subsequently withdrawn and the police took no further action.
4. The Respondent was 30 years old when he was sentenced and is now 35 years old. This is the first review of his recall.

Application for Set Aside

5. The application to set aside is from the Secretary of State and dated 10 May 2023. It submits that since the decision new risk related matters have come to light. The details of these matters were subject to an application for non-disclosure which has been granted. The material not to be disclosed to the Respondent has been seen by his legal representatives who gave an undertaking not to disclose the material to the Respondent. The Respondent has had access to a 'gist' or summary of the material. I have had access to all the material both disclosed and not disclosed.



6. The gist indicates that since the hearing, concerns have been raised about the Respondent's contact with his partner, and that the prison has now stopped his contact with her.

Current Parole Review

7. The Respondent's case was referred to the Parole Board by the Applicant to consider whether to direct his re-release on licence following his recall. The review was heard by way of oral hearing on 5 April 2023. The Respondent was legally represented throughout. The Secretary of State did not attend the hearing and made no representations with respect to their position as to re-release.
8. The Panel, having considered the case at the oral hearing, directed the Respondent's release on licence. The circumstances of the recall were considered and it was noted by the panel that the Respondent had, since the recall, been in daily telephone contact with his partner (which has now been stopped as indicated above).

The Relevant Law

9. 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.
10. 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)).
11. 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.
12. A decision is unlawful under the broad heading of illegality if the panel:
 - a) misinterprets a legal instrument relevant to the function being performed;
 - b) has no legal authority to make the decision;
 - c) fails to fulfil a legal duty;
 - d) exercises discretionary power for an extraneous purpose;

- e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
- f) improperly delegates decision-making power.

13. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, or associated legislation, but it may also be an enunciated policy or some other common law power.

The reply on behalf of the Respondent

14. The Respondent, through his legal representative, has provided representations in response to this application. These are dated 16 June 2023 and were sent via email. The representations indicate that while they acknowledge that there might be concerns about any risk to his partner, this can be managed through additional licence conditions. The representations also question why the Respondent was allowed to speak to his partner in the first place following the circumstances of the recall, and suggests that this 'set him up to fail'. This last point is not relevant to my consideration for this application.

Discussion

15. The application concerns a Panel's decision to direct release following an oral hearing under rule 25(1)(a). The application argues that the condition as set out in rule both conditions in rule 28A(4)(b)(i) (information not available to the Parole Board when the direction to release was made). As the Panel's decision is now final the application to set aside would appear to be an eligible decision which falls within the scope of rule 28A.

16. I have carefully considered the application to set aside and the matters relied on by the Applicant. I am also bound by the principles regarding non-disclosure, so am unable to set out the details of the material on which the Applicant relies. This material came to light following the decision to release. Because of the particular circumstances of this case, and despite the fact that the Respondent is legally represented, I have paid great attention to fairness to the prisoner while considering the application to set aside.

17. I am satisfied that had the oral hearing panel had the information that has come to light before it at the time of the hearing, it would not have made its direction for release in the manner in which it did, without further full exploration of this information.

18. I have considered the legal representations for the Respondent, who suggest that additional licence conditions may be a way of addressing any additional risk related issues rather than setting aside the decision. I do not consider that would be a sufficient remedy in this case without full exploration of the risk, however in any event I do not have the power to change the decision or any part of the decision of the panel.

19. 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. 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 that there are new risk related concerns.

Decision

20. For the reasons I have given, the application is granted, and the final decision of the panel dated 5 April 2023 should be set aside.

21. I must now consider two matters. 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.

22. Noting the previous panel's knowledge of this case, I consider that the previous panel would be best placed to consider the new evidence. The previous panel has the great benefit of having prepared and heard the case and considered all the evidence before it at the time. It is best placed to consider the case again, and I direct that it does so. I consider that this decision should be by way of oral hearing, and I make directions for this hearing below. The panel chair might well make further directions including that the case should be concluded on the papers. This hearing should be prioritised for listing. It is assumed that the current non-disclosure decision will continue until the oral hearing (or conclusion on the papers if that is what the panel chair directs).

Chitra Karve
18 July 2023