

[2023] PBSA 9

Application for Set Aside in the case of Newman

Application

1. This is an application initiated by the Chair of the Parole Board to set aside the decision made by an oral hearing panel (the panel) dated the 8 November 2022 to direct the release of Newman (the prisoner).
2. I have considered the initiation on the papers. These are:
 - a) The Decision Letter dated the 8 November 2022;
 - b) The dossier, numbered to page 889, of which the last document is an application to vary the detail of the identified exclusion zone in the release licence. The panel had a dossier numbered to page 869.
 - c) An application from the Secretary of State on the 1 February 2023 detailing new information and concerns about the prisoner. The application form included a response from the prisoner's legal representative and a response from a Duty Member of the Parole Board;
 - d) The initiation email of the 7 February 2023 from the Chair of the Parole Board;
 - e) Representations from the Secretary of State dated the 9 February 2023;
 - f) Representations from the prisoner's legal representative dated the 12 February 2023;
 - g) Further representations from the prisoner's legal representative dated the 14 February 2023;
 - h) An undated statement from the prisoner which was attached to the legal representations of the 14 February 2023; and
 - i) Further representations from the Secretary of State dated the 14 February 2023.

Background

3. On the 23 February 2017, the prisoner received an extended determinate sentence comprising of 8 years in custody and 5 years of an extended licence following his conviction for wounding with intent to cause grievous bodily harm (the index offence). The victim of the index offence was the prisoner's father. The prisoner was aged 21 at the time of sentencing and was 27 years old when the panel reviewed his case. He became eligible to be considered for release by the Parole Board in September 2021. If not released by the Parole Board he would be automatically

released, as is required by the law, at the conditional release date in his sentence in May 2024. The prisoner's sentence expires in May 2029.

4. The panel considered the case at an oral hearing on the 7 September 2022. The panel comprised of two independent members and a psychiatrist member. The prisoner was legally represented and oral evidence was heard from him, his Probation Officer in the community, the official supervising his case in custody, a psychologist employed by the prison service, a psychologist instructed by his legal representative and from two other professionals involved in his case. In its Decision Letter of the 8 November 2022, the panel directed that the prisoner should be released.

Initiation to Set Aside

5. On the 1 February 2023, the Secretary of State submitted an application to the Parole Board seeking consideration of whether a non-contact licence condition could be imposed and whether the decision to direct release could be reconsidered. New information had been provided from professionals working with the prisoner. He had spoken about his feelings about his father and was reported to have said:

"I wish I had never got back in contact with him, I feel as though I was forced to"....."I have the same feelings about my dad as I did when I did what I did"....."My Dad hasn't changed, I feel I will end up getting recalled again"....."I want restrictions in place, I want contact to be managed, so that I don't have to make any decision not to see him". "I feel a situation is going to happen if I disagree with him".

6. It was also reported that the prisoner had refused to take his medication for anxiety because he had indicated that he had not been taking it for three months and would not be able to receive it on release.
7. In response to that application, the prisoner's legal representative had indicated that it appeared that the prisoner would wish to have a non-contact licence condition in respect of his father. It was said that the prisoner was once again in receipt of his medication and it was submitted that any opportunity for reconsideration of the decision to direct release had passed.
8. On the 7 February 2023, a Duty Member of the Parole Board responded to the application from the Secretary of State. The Duty Member noted that the timescale for reconsideration had passed, however, noting the new information she invited the Secretary of State to consider whether he wished to make an application to set aside the decision to direct release.
9. The prisoner's release had been scheduled to take place on the 8 February 2023. Following the Duty Member's invitation, the Secretary of State confirmed to the Parole Board that he would not be making any application to set aside the decision to release the prisoner. The Chair of the Parole Board, noting the detail of the case, then initiated an application to set aside the decision.

The Relevant Law

10. 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. Rule 28A(1) also provides that the Parole Board may seek to set aside certain final decisions on the initiation of the Board Chair.
11. The types of decisions eligible for set aside are also set out in rule 28A(1). Final 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 made the decision on the papers (rule 21(7)).
12. 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 at the time of the direction had been so 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 parties

13. On the 9 February 2023, the Secretary of State provided further information. He reported that the prison was concerned by the comments made by the prisoner and that referrals would be made to review this. It was noted that the healthcare department had advised that prescribed medication would not reduce any potential risk from the prisoner towards his father. Although the prisoner was said to have restarted past medication, it was reported that this medication would not be effective for 6-8 weeks.
14. In representations of the 12 February 2023, the prisoner's legal representative submitted that the prisoner's anxiety had been heightened in the absence of medication and he had been anxious about his release. It was said that the prisoner had spoken to his father on the telephone which left him with a sense of inadequacy and fear for his pending release. The prisoner had advised his legal representative and the professionals involved in his case that he had no intention of causing harm to his father and he had asked for a non-contact licence condition to help him manage the relationship with his father. It was submitted that there had been no change in circumstances because the potential for a strain in the relationship between the prisoner and his father was already known, and the new information provided since the panel's decision, if it had been known at the time, would not have led to a different decision being made.

15. On the 14 February 2023, the prisoner's legal representative provided further submissions and included a statement from the prisoner which it suggested would provide greater context and meaning as to why he said what he did about his father. It was submitted that the decision to release him should remain. I have read the prisoner's statement with great care.
16. On the 14 February 2023, the Secretary of State simply stated that he had no objections to the initiation of an application to set aside the release decision and that he had nothing further to add.

Discussion

17. In its Decision Letter of the 8 November 2022, the panel noted the extensive work undertaken by the prisoner in custody, which had included work on his relationship with his father. The prisoner had been reported to be having regular contact with his father and he told the panel that he had no resentment or animosity towards his father. The panel heard in oral evidence that witnesses did not have concerns about any future risk from the prisoner towards his father. There had been a difference of opinion as to whether the prisoner should be prevented from contacting his father on release and the panel determined that a non-contact condition would be disproportionate, given the level of contact that had developed in custody. It found that the prisoner's father would, in any event, be protected by the inclusion of a proposed exclusion zone.
18. In my view, the new information demonstrates a change in circumstances in this case and I cannot be satisfied that the panel would have been minded to direct release had this change occurred before the release decision was given. The comments from the prisoner suggest a different view towards his father than the one presented to the panel.

Decision

19. For the reasons I have given, the final decision of the panel dated the 8 November 2022 should be set aside.
20. 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.
21. In representations of the 12 February 2023, the prisoner's legal representative submits that any decision to set aside should lead to the case being referred back to the original panel. This, it is said, is because of the panel's "*lengthy background involving a number of hearings and case conferences which were convened in the lead up to the oral hearing where the case was eventually concluded ... This case is extremely complex. The original panel are best placed to directly consider the new evidence ... it would also be our submission that this case should be directed back to an oral hearing ...*".

22. The previous panel has the great benefit of having prepared and heard 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.
23. 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.
24. I direct that all material presented in the application to set aside be added to the dossier so that the panel can have sight of it. Parties are at liberty to submit representations to the panel.

Robert McKeon
22 February 2023