

[2022] PBRA 6

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

Application

1. This is an application by the Secretary of State for Justice (the Applicant) to set aside the decision made by a Member Case Assessment (MCA) panel following a paper review dated 12 September 2022 to direct the release of Wakefield (the Respondent).
2. I have considered the application on the papers. These are the paper decision, the dossier, written representations from the Respondent, a security report dated 6 October 2022, an email dated 10 October 2022 detailing information from the Prison Offender Manager (POM) and the application for set aside which was completed on a Stakeholder Response Form dated 6 October 2022.

Background

3. On 31 July 2020, the Respondent received a determinate sentence of 3 years 1 month and 24 days' imprisonment in total following conviction for Burglary, Theft of a vehicle, Making off without payment, Handling stolen goods, Breaching a suspended sentence and Using a vehicle whilst uninsured. His sentence expires on 30 March 2023.
4. The Respondent was aged 19 at the time of sentencing. He is now 21 years old.

Application to Set Aside

5. The application to set aside is dated 6 October 2022 and has been drafted and submitted by the Public Protection Casework Section (PPCS) acting on behalf of the Applicant.
6. The application to set aside explains the respondent's history of offending and the reasons for recall. The application then reports that, on 6 October 2022, PPCS received an email to inform them that the Respondent had been in segregation since 26 September 2022 "*having been found in possession of a mobile phone and a homemade weapon*". The application goes on to explain that the Respondent's cell was searched on 25 September 2022 and an iPhone was found and he was placed on report. The next day during an "*intel led search*" of his cell staff found an iPhone and charger, with a weapon inside a sock (later confirmed to be a small knife). The Respondent explained he had been forced to hold the iPhone and provided the names of those involved. The charges were dismissed as a result of him providing the information. A security report was attached to the application.



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7. The Applicant argues that the incidents elevate the Respondent's risk of harm to a level which is not manageable in the community. However, the application also includes the view of the Community Offender Manager (COM) in this case who expressed concerns about negative peers but "*remains confident that the current RMP (risk management plan) in place can manage [the Respondent's] risk in the community and does not seek any adjustment to that plan at this juncture*".

Current Parole Review

8. The Respondent had been released earlier than the automatic release point in his sentence by the Secretary of State on a licence with specified curfews (monitored by electronic tag) on 20 April 2021. His licence was revoked on 2 June 2021 and he was returned to custody. He had been arrested and charged with the murder of a young man on the basis of a joint enterprise with others.
9. The Respondent's case was referred to the Parole Board by the Secretary of State to consider whether it would be appropriate to direct his re-release following the revocation of his licence. The first review of his case was completed on the papers on 1 December 2021 and the panel made no direction for release. The Respondent was awaiting trial for the further charge at that stage.
10. His case was then reviewed for a second time which led to the decision to direct release to designated accommodation, which is the subject of this application. By that stage, the Respondent had been found not guilty of the further allegation, although others had been convicted. The Respondent's electronic tag had provided evidence that he was not at the scene of the murder. His COM was recommending re-release.

The Relevant Law

11. Rule 28A(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) provides that a prisoner or the Secretary of State may apply to the Parole Board to set aside certain final decisions. Similarly, also under the Rules, 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 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)).
13. A final decision may be set aside if it is in the interests of justice to do so (rule 28A(3)(a)) **and** one or more of the conditions in rule 28A(4) are satisfied:
- 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
 - (i) information that had not been available to Board had been available, or

- (ii) a change in circumstances relating to the prisoner after the direction was given, had occurred before it was given.

14. Under Rule 28A(5) an application to set aside a decision must be made within 21 days of the decision. However, if the application relies on 28A(4)(b) i.e it relates to new information or a change in circumstances then it can be made at any point before the prisoner is released.

The Reply from the Respondent

15. The Respondent has provided personal representations in response. He highlighted that the application was not accurate and did not include relevant detail. The Respondent explained that he admitted to the initial mobile telephone possession and then, when speaking to the Prison Governor during the adjudication process, he explained how the item had come to be in his cell. He also told the Prison Governor that more items had been passed to him after the first cell search. The Respondent explained what the items were and where to find them. In his response, he explained he was in segregation due to informing on others. He argued that he did not present risk to the public and had just been honest and helped prison officers retrieve the forbidden items. He also submitted that he would abide by his licence conditions and had a job available to him which would help him keep busy.

Discussion

Eligibility

16. The application concerns a panel's decision to direct release following a paper review under rule 19(1)(a). The application was made prior to the Respondent's release and provides information about how 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.

Change in circumstances and the test for setting aside

17. In order to set aside this decision, I have to be satisfied that it is in the interests of justice to do so.

18. I also have to be satisfied that the incidents described in the application constitute a change in circumstances and that the direction given for release would not have been given if that change in circumstances had occurred before the direction was given.

19. In determining the application for set aside, I will first consider whether the events described above would have affected the panel's decision to direct the Respondent's release. A breach of prison rules can of course constitute a change in circumstances, particularly one where illicit items are found, including a potential weapon. However, I must look at these particular circumstances to decide if it was a change in circumstances which would have affected the decision made by the panel. It is important to highlight that the Respondent's version of events has since been

confirmed by his POM in an email from PPCS dated 10 October 2022. The POM confirmed that the adjudication was dismissed as the Respondent was the person who told staff where to find the items and had explained that he was under pressure to hold the items. The POM also confirmed that the Respondent was placed in segregation for his own protection rather than him constituting a risk to anyone else.

20. The paper decision directing the Respondent's release details matters which the panel took into account and provides the formal reasons for its decision. Within it, the panel had accepted the OASys assessment that the Respondent posed a high risk of serious harm and noted that the Respondent had a mixture of both negative and positive comments in custody, including allegations of assault in 2021. All of that was taken into account at the point the decision was made.

21. The panel made an assessment, as made clear in its reasons, that the Respondent was likely to comply on release and had sufficient motivation to do so. I have to consider whether the breach of prison rules would have affected that assessment. The Applicant argues that the further incidents should lead me to conclude that a full re-examination of the case is necessary in order to consider the Respondent's ability to make better decisions in respect of his peer group and managing external pressures and whether he can adhere to controls on his behaviour in a community setting. However, on the evidence provided, the Respondent has given an explanation for possession of the items and then revealed information, at great risk to himself, in order to assist the authorities. The security report provided also backs up the Respondent's version of events. He has chosen to distance himself from negative peers in custody in order to help those tasked with managing risk within the prison. Whilst the application refers to an intelligence led search, it is clear that the intelligence came from the Respondent himself. But for his disclosures, these items may never have been found and could have been used to cause harm. In the panel's assessment, this may well have strengthened the assessment regarding likely compliance and honesty with professionals rather than caused the panel to change its mind about its decision.

22. The Applicant submits that the incidents have raised the level of risk in a way which means the Respondent cannot be managed in the community. However, I am particularly mindful that the new developments have not changed the COM's support for the Respondent's re-release and have not given the COM any cause for concern such that they have added any fresh licence conditions or altered the risk management plan in any way. The Applicant states that the COM remains confident that the risk can be managed in the community under the plan provided which contradicts the submission made by the Applicant. Therefore the recommendation and the plan to manage release had not changed from when it was considered by the panel which adds considerable weight to the argument that the panel would not have altered its decision if it had known about the searches and adjudication.

23. The Rules set a high bar for setting aside a decision. I must be satisfied that the direction for release would not have been given if the panel had known about what had happened since. Inevitably, I have to put myself in the panel's shoes and carefully assess the further developments against the backdrop of what was already known about the Respondent. The Applicant sets out the Respondent's offending background and the reasons for recall but it is not my role to revisit those as that was all information known at the point the panel made its decision and was analysed

within the panel's written reasons. Having considered the application and surrounding information carefully, I am not satisfied that the direction for release would not have been given if the events detailed in the application had taken place before that direction was given.

24. In addition, I must look at whether it would be in the interests of justice to set this decision aside. For the reasons I have given above, it cannot be said that it would be in the interests of justice to interfere with this decision.

Decision

25. For the reasons I have given, the application is refused, and the decision of the panel dated 12 September 2022 remains final.

Cassie Williams
25/10/2022