

[2022] PBSA 2

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

Application

1. This is an application by the Secretary of State for Justice (the Applicant) to set aside the decision made by an oral hearing panel dated 22 July 2022 to direct the release of Forester (the Respondent).
2. I have considered the application on the papers. These are the oral hearing decision, the dossier, the application for set aside, a copy of the Report of an Adverse Development (**LISP4**) dated 17 August 2022 and a copy of the Respondent's Release on Temporary Licence (**ROTL**) conditions relating to his temporary release from 9 June 2022 to 13 June 2022. I have also made enquiry of the Probation Service who have supplied details of communications with the Applicant.

Background

3. The Respondent received an extended sentence comprising 10 years in custody with a four-year extended licence period on 29 May 2015 following conviction on seven counts of sexual assault of a female child under 13. His parole eligibility date passed in January 2022. His conditional release date is in May 2025 and his sentence expires in May 2029.
4. The Respondent was aged 46 at the time of sentencing. He is now 53 years old.

Application for Set Aside

5. The application for set aside is dated 17 August 2022 and has been drafted and submitted by the Public Protection Casework Section acting on behalf of the Applicant.
6. The application for set aside reports a number of events which are argued to constitute a change in circumstances relating to the prisoner which would have meant that panel would not have directed release if those events had happened before that direction was given.
7. This submission is supplemented by information in the LISP4 to which reference will be made in the **Discussion** section below.

Current Parole Review

8. The Respondent's case was referred to the Parole Board by the Secretary of State in April 2021 to consider whether it would be appropriate to direct his release.
9. The case proceeded to an oral hearing on 22 June 2022 before a three-member panel comprised of two independent members and a judicial chair. The Respondent was legally represented throughout. Oral evidence was given by the Respondent's Prisoner Offender Manager (**POM**), his Community Offender Manager (**COM**) and an HMPPS psychologist. The panel directed the Respondent's release.
10. The Respondent's provisional release date was 19 August 2022.

The Relevant Law

11. 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.
12. 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)).
13. 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.

The reply on behalf of the Respondent

14. Submissions drafted by solicitors on behalf of the Respondent set out the Respondent's view of the circumstances surrounding his return to closed conditions and argue that the release decision should stand. If the decision is set aside, the Respondent seeks an oral hearing in the interests of fairness and pursuant to the principles set out in **Osborn v Parole Board [2013] UKSC 61**.

Discussion

Eligibility

15. The application concerns a panel's decision to direct release following an oral hearing under rule 25(1)(a). The decision was subject to the reconsideration mechanism afforded by rule 28, but with no such application for reconsideration having been

received within 21 days, it became final on 12 July 2022. The application was made prior to the Respondent's provisional release date of 19 August 2022 and relies upon the ground in rule 28A(5)(b)(ii). It is therefore an eligible decision which falls within the scope of rule 28A.

Change in circumstances

16. The application notes that, on 17 August 2022, the Respondent had been recategorised from Category D (open) conditions to Category C (closed) conditions and was to be returned to closed conditions imminently.
17. The reasons for the Respondent's return to closed conditions are set out in the application and amplified by further detail in the LISP 4. In short, an intelligence-led security search of the Respondent's car disclosed an iPad which had not been disclosed to his POM, COM, or the prison. A preliminary search of the iPad showed that it belonged to the Respondent and that he had signed up to a 12-month subscription of a commercial virtual private network (**VPN**) service on 11 June 2022. The Respondent was in the community on release on temporary licence (ROTL) and living at designated accommodation from 9 – 13 June 2022. It follows that he subscribed to the VPN while on under supervision on ROTL.
18. Put simply, a VPN service creates an encrypted tunnel for network data such that a user's internet service provider (**ISP**) will only be able to see the amount of traffic travelling to and from a device, and the fact that a user's actual online traffic is hidden from them. That means the ISP loses access to the websites a user visits, specific web pages browsed, browsing and search history, files uploaded or downloaded to unencrypted websites, and the information typed on unencrypted websites.
19. The Respondent accepts that an iPad (with the VPN application) was found in his car and that it had not been declared to the prison or "*professionals*" (which I take to mean his POM and/or COM).
20. The Respondent submits that he was not precluded from owning an internet-enabled device while on ROTL. I note his ROTL licence does not specifically preclude him from doing so whereas his release licence would have done (as explained to him by his POM and COM on 16 June 2022, after he had acquired the iPad in question).
21. Regardless, the ROTL licence is clear (and the Respondent acknowledges) that he was not to delete the usage history on any internet-enabled device.
22. The application submits that the Respondent had breached the ROTL licence condition requiring him:

"Not to delete the usage history on any internet enabled device or computer used and to allow such items to be inspected as required by the police or your supervising officer. Such inspection may include the removal of the device for inspection and the installation of monitoring software".

23. The Respondent submits that he was not precluded from owning an internet-enabled device while on ROTL. While I note his ROTL licence does not specifically preclude him from doing so, it does prohibit him from owning or possessing more than one mobile phone or SIM card. However, it is not clear whether iPad in question had cellular connectivity (via a SIM card) alongside Wi-Fi. Regardless, the ROTL licence is clear (and the Respondent acknowledges) that he was not to delete the usage history on any internet-enabled device.
24. The Respondent submits that the VPN application is not capable of deleting usage history but is a means of protecting personal data when using a device in public. He argues that he has not deleted any usage history.
25. The net effect of using a VPN is such that a user's ISP cannot access their usage history and thus no third party would be able to view a user's history. Whether taking steps to obfuscate a usage history (or not creating one in the first place) constitutes a deletion of that history is a technicality falling outside the scope of this set-aside decision.
26. Indeed, it is not for me to determine whether the Respondent has, in fact, breached his ROTL licence. However, it appears that he has, at the very least, taken steps to prevent his online activities from being scrutinised. His openness is also called into question as he is reported not to have disclosed the iPad to his POM, COM, or the prison even after he knew that its possession could constitute a potential breach of his release licence.
27. The Respondent argues that he contacted the probation office between receipt of the final release decision and prior to the iPad being found with a view to informing his COM that he owned the device. Probation records indicate that the Respondent called the probation office on 15 August 2022 and 17 August 2022, but was not able to speak to his COM.
28. The application further notes that the Respondent's iPad is now under investigation by the police and that his COM now assesses his risks as no longer being manageable in the community.
29. The Respondent submits that he is confident that the police investigation will show that he has not delete any usage history.

The test for set aside

30. In determining the application for set aside, I must first consider whether the events described above would have affected the panel's decision to direct the Respondent's release.
31. In making its decision the panel noted the support of the COM for release. It acknowledged that the success of release would depend to a significant extent on the Respondent's honesty and openness with professionals.
32. The new information has resulted in the removal of the COM's support and provides evidence to suggest that the Respondent has sought to conceal his online activities

from professionals (and was doing so during ROTL less than two weeks prior to his oral hearing). I also note that, in 2010, the Respondent was convicted (among other sexual offences against children) on 20 counts of making indecent photographs of children and three counts of possession of indecent photographs of children.

33. In addition, the licence condition which is said to have been broken on ROTL is repeated verbatim in the Respondent's release licence as one of several licence conditions which restricting his access to and use of technology. Such conditions are common on licences for prisoners who, like the Respondent, have been convicted of sexual offences against children.
34. Moreover, I note that the LISP4 refers to a meeting between the Respondent and his POM and COM on 16 June 2022, prior to the oral hearing in which the COM told the Respondent of the additional licence conditions being recommended relating to the use of technology. The Respondent questioned why such conditions were needed since his conviction for online offending related to a previous sentence. The installation of the VPN software gives rise to a further compliance issue in the light of the Respondent previously challenging the necessity of the condition he is said to have broken.
35. I also note that LISP4 records that the Respondent made unusual efforts to gain access to his car which raised suspicions about what he might have stored in it. It appears that this was the precipitating factor for the intelligence-led search by Security in which his iPad was discovered. His non-disclosure of the device and his attempt to conceal it in his car also gives rise to compliance concerns. Although I note the Respondent's attempts to contact his COM around that time, there is no evidence within probation records that suggests the reason for his call was to disclose the iPad. There is also an ongoing police investigation relating to the content stored on the iPad.
36. In light of these developments, I am 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.
37. Having decided that 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.
38. I am satisfied that it is in the interests of justice for the panel's decision to be set aside. Neither the Parole Board, nor the Secretary of State's witnesses were, or could have been, aware of the Respondent's conduct prior to the oral hearing, and the interests of justice would not be served if the release of a prisoner with multiple convictions for child sexual offences took place in the knowledge that he appears to have taken steps to conceal his online activities, failed to disclose relevant matters to probation, and acted in a way that appears to be non-compliant with a licence condition put in place for public protection.

Decision

39. For the reasons I have given, the application is granted, and the final decision of the panel dated 22 July 2022 should be set aside.
40. I must now consider two matters under rule 28A(9). 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.
41. 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.
42. I have considered whether an oral hearing is necessary considering the **Osborn** principles. The Respondent has put forward his view of the circumstances which led to his return to closed conditions; there is an ongoing police investigation; and his COM has withdrawn support for the Respondent's release. An assessment of the extent to which the change in circumstances is relevant to risk and the protection of the public is self-evidently required and fairness demands that this should take place via an oral hearing.

Stefan Fafinski
14 September 2022