

[2022] PBSA 4

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

Application

1. This is an application by the Secretary of State for Justice (the Applicant) under rule 28A(1) of the Parole Board Rules 2019 to set aside a decision of the Parole Board dated 5 September 2022 directing the release of Koomer (the Respondent). The application is made on the ground that there is information which was not available to the Board at the time of its decision and the Board would not have made the release decision if that information had been available to it.
2. Rules 28A(4) and (5) of the Parole Board Rules, so far as relevant to this application, provide that a decision maker appointed by the Parole Board may set aside an eligible decision (as set out in rule 28A(1), (2) and (4)) if the decision maker is satisfied that the direction for release of a prisoner would not have been given if "*information which was not available to the Board when the direction was given had been so available*" and it is in the interests of justice to set aside the decision.
3. I have considered the application on the papers. These are the dossier (now running to some 234 pages including the decision letter); the application to set the decision aside (dated 9 September 2022); further information, details of which are set out below; and representations made on the Respondent's behalf, summarised below.

Background

4. On 8 October 2020 the Respondent received a determinate sentence of imprisonment of 29 months for dwelling house burglary. Subsequently on 9 February 2021 he received a concurrent sentence of 12 weeks for a racially aggravated public order offence and further short concurrent sentences for theft from and interfering with motor vehicles. He was released on licence from this sentence on 13 August 2021 but recalled on 24 April 2022. It is recorded that his sentence will expire on 10 November 2022.
5. The Respondent has a lengthy history of offending. Most of his offending has been acquisitive but there are convictions for racially aggravated public order offences. The concurrent sentence of 12 weeks was imposed for racial abuse and threats to a member of staff at substance misuse service premises, including a threat to "*come back and bomb*" the premises.

Application to Set Aside

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6. The Applicant's application is dated 9 September 2022. It was forwarded to the Parole Board on that date to a case manager. The SSJ should note for future reference that there is a dedicated point of receipt - the set aside inbox - for applications of this kind to ensure that the application is immediately actioned by staff.
7. The grounds of the application are that, unknown to the Community Offender Manager ('the COM') and to the panel which dealt with the Respondent's referral, there were at the date of the release decision outstanding charges against him alleging offences of violence. It is said that the offences came before the Magistrates Court on 17 August 2022 by video link and that he was "*remitted for sentence in custody*" until 14 September 2022. It is said that the COM has concluded that the current risk management plan cannot safely manage his risk and that she wishes to re-assess his risk and the plan.
8. On receipt of this information I asked for the Applicant to provide further details of the charges and information as to what had transpired since the application was made.
9. On 10 October 2022 the Applicant forwarded initial details of the prosecution case dated 17 May 2022 running to some 59 pages. It is alleged that on 13 January 2022 the Respondent threatened three young women with bleach, saying he would throw it in their faces; and that he urinated in the holding cell at the police station. The initial charges were possession of an offensive weapon (the bottle of bleach), 3 offences against section 4 of the Public Order Act, and criminal damage. The Respondent was granted police bail. The papers were posted to the Respondent's address but by this time he had already been recalled for other reasons.
10. The Applicant also informed the Board that the Respondent has been convicted and sentenced to 9 weeks imprisonment. It is said that his release date is 10 November 2022. The Respondent's representative has confirmed that he was sentenced to 9 weeks' imprisonment on 30 September 2022. I have not been told the precise offences of which he has been convicted.
11. The Applicant's case for setting aside the release decision could also now be put on the basis of a change of circumstances - the new sentence imposed since the decision was issued: see rule 28A(5)(b)(ii). However it has not been put that way in the application and I think it is sufficient to address the way in which the application has been put.

Current Parole Review

12. The present review was initiated following the Respondent's return to custody in April 2022. Directions were given on 24 June 2022; it was decided that the case would have to be considered on paper because there was insufficient time to organise an oral hearing prior to the sentence release date. The directions called for a report from the COM; this was provided on 22 August 2022. There were representations from the Respondent's solicitors dated 26 August 2022. Neither the COM's report nor the solicitors' representations mentioned that the Respondent was subject to further charges.

13.As noted above, the release decision was taken on 5 September 2022. The decision was taken by a single member on the papers. The member had a dossier then running to some 236 pages. The dossier does not contain any mention of the further charges.

The Relevant Law

14.The decision to release the Respondent was taken under rule 19(1)(a) of the Parole Board Rules 2019. Such a decision is a final decision and is eligible for the set aside procedure: see rule 28A(1) and (4) of the Rules. I have been appointed as decision maker for the purposes of this application. I may decide the application for myself or I may delegate the role of decision maker to the chair of the panel which made the decision: see rule 28A(12).

15.An application under rule 28A(1) must be brought prior to the prisoner's release: see rule 28A(6)(b).

16.Rule 28A(4) provides that the decision maker may set such a decision aside if satisfied that (1) one of the conditions in rule 28A(5) is applicable and (2) it is in the interests of justice to do so.

17.The condition on which the Applicant relies is set out in rule 28A(5)(b)(i) which provides:

"(b)the decision maker is satisfied that a direction given by the Board for the release of a prisoner would not have been given if

(i) information that was not available to the Board when the direction was given had been so available"

The reply from the Respondent

18.On behalf of the Respondent his representative submits that, since he was remanded in custody from 16 August, the days between 16 August and 30 September 2022 will be credited against his sentence; he would be entitled to release at the half way point of that sentence; and therefore he was entitled to release from the new sentence on or about 17 September (not 10 November as the Applicant states) and has since that date been eligible for release from the sentence for the index offence. It is submitted that the Respondent can safely be released and that it is strongly in the interests of his rehabilitation and the prevention of further offences that he should not be released on 10 November 2022 without support and accommodation.

Discussion

19.I am satisfied that there is information relating to the Respondent which was not available to the Parole Board at the time of the decision. At that time he had been charged with further offences, most significantly relating to the possession of an offensive weapon (the bleach) and the threats to throw it in the faces of three young women.

20. I am also satisfied that the direction for release made on 5 September 2022 would not have been made if that information had been available to the Parole Board. The task of the panel was to decide whether it was necessary for the protection of the public from serious harm that the Respondent be confined. Relevant information is information which could affect the panel's assessment of risk. The further charges related to the possession of an offensive weapon and threats of violence. It is highly improbable that a panel would have released the Respondent on paper under rule 19 if it had been aware of these further charges. The panel member would have required information about the charges; information as to the court proceedings and their outcome; and further input from the COM.
21. I turn to the question whether it is in the interests of justice that the direction for release should be set aside. I am also satisfied that it is in the interests of justice that the direction for release should be set aside.
22. This is a convenient point at which to address the submissions of the Respondent's representative concerning the effect of the new sentence.
23. I do not accept that the Respondent was entitled to credit against the new sentence for days spent on remand after 16 August 2022. Credit for periods spent on remand is not given if the offender was also held in custody on another matter: see section 240(ZA)(4) of the Criminal Justice Act 2003. The Respondent was on any basis a serving prisoner until the direction for his release on 5 September 2022. The effect of 28A(11) of the Parole Board Rules 2019 is that he continued to be held on the existing sentence pending resolution of this application. It follows that the Respondent's 9 week sentence effectively began on 30 September 2022; the half way point will be at the beginning of November, and he will not be eligible for release until then.
24. I should add that the Respondent will be subject to supervision requirements under the new sentence: see section 256AA of the Criminal Justice Act 2003. So he will not cease to be subject to supervision on 10 November 2022.
25. I have reached the conclusion that it is in the interests of justice to set aside the release decision dated 5 September 2022. I can see no injustice to the Respondent in doing so; if there is no injustice to the prisoner I think it will generally be in the interests of justice to set aside release directions which would not have been made if relevant information was before the Board. My only hesitation in this case is that setting aside the decision will have little impact on the date of the Respondent's release and will involve a further decision on paper by a panel. However, the amount of work for a panel will be quite small, and on the whole I think it best to regularise the position.
26. I am satisfied that the application was brought before the Respondent's release.
27. I see no useful purpose in delegating this application to the panel chair; there will be cases where the panel chair will be in the best position to decide what impact information would have had on a direction for release, but this is not such a case. Having read the papers it is best for me to decide it and write the reasons as I have done.

Decision

28. For the reasons I have given I am satisfied that the application should be granted. The release decision dated 5 September 2022 is set aside.

29. It would perhaps be desirable, in a straightforward case such as this, if the decision maker dealing with the application to set aside could at the same time decide the case on the papers. However rule 28A(9) does not provide this option. In accordance with rule 28A(9) I direct that the case be decided again on the papers by the previous panel or, if the previous panel is not available, by a new panel. This decision should be added to the dossier; so should the further information to which I have referred in paragraphs 9 and 10 above.

David Richardson
19 October 2022