

[2023] PBSA 32

**Application for Set Aside by the Secretary of State for Justice
in the case of Bracher****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 28 March 2023 to direct the release of Bracher (the Respondent).
2. I have considered the application on the papers. These are the oral hearing decision, the dossier, and the application for set aside (5 May 2023).

Background

3. The Respondent received a determinate sentence of 11 years imprisonment on 25 February 2014 following conviction for wounding/inflicting grievous bodily harm contrary to s18 of the Offences Against the Person Act 1861.
4. The Respondent has been previously released on licence on the 4 October 2019 and 5 October 2020, and most recently on the 14 September 2021. Her licence was revoked on 1 November 2021 and she returned to custody on the 13 December 2021. The Respondent's recall was instigated due to non-compliance with her licence: primarily the condition relating to residency.

Application for Set Aside

5. The application for set aside has been drafted and submitted by the Public Protection Casework Section (PPCS) acting on behalf of the Applicant.
6. The application for set aside submits further information which, it is argued, constitutes a significant change in circumstances which impacts the risk management, and which came to light after the panel made its decision.

Current Parole Review

7. The Respondent's case was referred to the Parole Board by the Applicant to consider whether to direct her release.



8. The case proceeded to an oral hearing on the 28 March 2023 before a three member panel of the Parole Board. The panel consisted of two independent members and a judicial member.
9. The panel directed the Respondent's release.

The Relevant Law

10. Rule 28A(1)(a) 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(1)(b), the Parole Board may seek to set aside certain final decisions on its own initiative.
11. 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)).
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 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

13. Comprehensive legal submissions dated 16 May 2023 were provided for consideration. It is submitted that the Respondent denies the allegations made and considers them to be malicious and/or mistaken. It is further submitted that the Respondent has not been questioned yet by the Police in relation to one of the allegations and that the matter pre-dated the oral hearing in any event.
14. Further, it is submitted that one of the allegations has been dismissed at adjudication (unverified).

Discussion

Eligibility

15. The application concerns a panel's decision to direct release following an oral hearing under rule 25(1). The application was made prior to the Respondent being

released and argues that 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.

New information - change of circumstances

16. The application notes an alleged sexual assault and an allegation linked to holding illicit items (hooch).
17. The allegation of sexual assault is said to have occurred on the 17 April 2023. It is alleged that the Respondent, along with another, assaulted the complainant (another prisoner) in a manner which was sexual. This was following a social visit when a 'pass' was thought to have been made. It is said that this matter has been referred to the police who are investigating the allegation further.
18. The second allegation is that a quantity of illicitly brewed alcohol ('hooch') was found in the Respondent's cell. No date is provided for this incident. The unidentified liquid was found in a blue thermos flask in the Respondent's cell. It is unclear from the papers when this incident occurred.

The test for set aside

19. In determining the application for set aside, I must consider whether the incidents described above would have affected the panel's decision to direct the Respondent's release.
20. The Respondent disputes the allegations made. The Respondent argues that the sexual assault allegation is vexatious and highlights that the alleged assault took place before her oral hearing date. The Respondent further submits that she was adjudicated for the hooch matter and the adjudication was dismissed. She denies being in possession of hooch, on that occasion, or at all.
21. Whilst I note the Respondent's detailed submissions, the allegations made against her are very serious, especially the allegation of sexual assault and, if true, could be indicative of outstanding treatment needs which would be highly relevant to risk and therefore had the capacity to affect the panel's decision.
22. Although the allegation of sexual assault is unsubstantiated at this time, the Community Offender Manager, states in terms in the application dated 5 May 2023, that the Respondent 'is now under police investigation' and there is no evidence provided elsewhere in the papers to rebut this assertion, except the fact that the Police have yet to contact the Respondent. Given the seriousness of the allegation, and the relevance of the allegation to risk, I am satisfied that the direction for release would not have been given if the new information had been before the panel.

23. Having decided that panel's decision to direct release would have been affected, I must finally consider whether it is in the interests of justice for its decision to be set aside.
24. I am so satisfied. The interest of justice would not be served directing the release of a prisoner who is currently under police investigation for a very serious allegation, which, if substantiated, would be indicative of outstanding treatment needs and elevated risk.

Decision

25. For the reasons I have given, the application is granted, and the decision of the panel on the 28 March 2023 should be set aside.
26. I must now consider two matters under rule 28A(8). 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.
27. The previous panel has the great benefit of having prepared 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.
28. I have also considered whether an oral hearing is necessary considering the principles in **Osborn v Parole Board [2013] UKSC 61**. In all the circumstances, I consider that an oral hearing should be directed. Although the matter of the hooch may be more easily resolved, the new allegation is likely to require anxious scrutiny, especially as the Respondent denies the allegation. This is better achieved via oral evidence, in my view. An oral hearing will also afford the Respondent the opportunity to provide her own account, in the interests of fairness.

Heidi Leavesley
7 June 2023