

[2024] PBSA 40

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

1. This is an application by the Secretary of State for Justice (the Applicant) to set aside the decision (the Decision) to direct the release of Fogo (the Respondent). The decision was made by a panel after an oral hearing on 26 March 2024. This is an eligible decision.
2. I have considered the application on the papers. These are the Respondent's dossier, the Decision, the application to set aside the Decision and the response of the Respondent's legal representative. On the 16 May 2024 further directions were also issued for further information from the Applicant and Respondent which were received on the 13 June 2024 and 20 June 2024 from the Public Protection Casework Section (PPCS) on behalf of the Applicant and representations from the Respondent's legal representative received on the 27 June 2024.

Background

3. On 28 November 2001, the Respondent was sentenced to life imprisonment with a minimum term of 16 years less time spent on remand following his conviction for murder, to which he had pleaded guilty. On the same date, the Respondent had received a concurrent sentence of 5 years' imprisonment for an offence of wounding with intent to do grievous bodily harm.
4. The Respondent was aged 22 years old at the time of sentencing. He is now 45 years old.

Application for Set Aside

5. The application for set aside has been drafted and submitted by the PPCS on behalf of the Applicant.
6. It submits that the Decision given by the Board for the release of the Respondent would not have been given if a change in circumstances relating to the Respondent that occurred after the Decision was made had occurred before it was given.
7. It is contended in the present application that the critical change of circumstances which occurred after the Decision was given was that on 19 April 2024, the Prison



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Offender Manager (POM) of the Respondent notified the Applicant that there had been an adverse development in that intelligence had been received on that day at the Prison that the Respondent had on at least three occasions been at locations which were not authorised or permitted or disclosed for him to be at whilst out on work during Release on Temporary Licence (ROTL). This intelligence will hereinafter be referred to as "the specified intelligence".

8. The three occasions were:

- (a) On 23 February 2024, the Respondent's work timetable indicated that he should have only been in location A but intelligence indicated that he was in location B;
- (b) On 31 March 2024, the Respondent's work timetable indicated that he should have only been in location C between the shift hours 06:00 hours and 16:00 hours on that day, but intelligence indicates that he was in part in location D during these hours;
- (c) On 14 April 2024, the Respondent's work timetable indicated he should only have been in location C between the shift hours of 06.00 hours and 16.00 hours on that day, but intelligence indicates that he was in location D during some of this time.

9. When the specified intelligence was disclosed to the Respondent, he was unable to give a plausible explanation or justification for the intelligence. In consequence, the Respondent's risk of absconding had increased, and it was assessed that he could no longer be managed in the open estate, and he was then returned to closed conditions where he remains. In other words, the fact that the Respondent had not been complying with his ROTL licence conditions meant that he had become a risk which required him to be moved to closed conditions.

Current parole review

10. The Respondent's case was referred to the Parole Board by the Applicant to consider whether to release him.

11. The case proceeded to an oral hearing on 26 March 2024 before a three-member Panel which heard evidence from the Respondent, his POM, his Community Offender Manager (COM), and a HMPPS psychologist. The Respondent was legally represented throughout the hearing.

12. The Panel directed the Respondent's release.

The Relevant Law

13. 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.

14. The types of decisions eligible for set aside are set out in rule 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)).
15. 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 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
 - a direction for release would not have been given if information that had not been available to the Board had been available, or
 - a direction for release would not have been given 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

16. The Respondent's legal representative has made representations on the Respondent's behalf in relation to the three incidents mentioned in the specified intelligence and the Respondent's conduct. The Respondent's legal representative submitted that:
- The specified intelligence does not relate to an escalation in the risk of the Respondent causing serious harm and there is no evidence of the prisoner acting in breach of the exclusion zone;
 - the Respondent duly attended work when required and only left when he had been allowed to do so by his superiors and he was never provided with an approved travel route;
 - it was common practice for prisoners to buy fuel on the way back from work and to stop for food before returning to the prison;
 - in relation to the journey on 23 February 2024, the Respondent believes that he would have stopped off in location B for fuel and food. It was pointed out that the Google Map Route Planner specified that the recommended route from the Respondent's place of work at location A to the Prison goes through location B.
 - the Respondent deviated on his return journey on 31 March 2024 from his place of work in location C to the Prison to visit his mother's house in location D where he picked up a work overall and some food;
 - in relation to the journey on 14 April 2024, the Respondent was released from work early in the morning as there was no other work for him that day and he accepts that he should then have returned to the Prison, but instead he decided to go to location D to spend the day with family and

friends. After spending much time with his sister, he attended the christening of his friend's daughter in the afternoon where he stayed outside the christening because he was not wearing suitable clothing for attending a christening. Crucially he was able to congratulate and associate with his friends. Not surprisingly the Respondent accepts that his conduct in associating with his sister and his friends constituted a breach of the terms of his ROTL, and he regrets his behaviour.

Discussion

17. The Applicant contends that the Panel would not have given a direction for the Respondent's release if they had known that he would behave in the way set out in paragraph 8 and been in locations not permitted for him to be at whilst out on a work ROTL or returning after completing his day's work. Any panel considering whether to grant parole to any prisoner has to consider two basic questions, the first is what conditions must be imposed on the prisoner to ensure that he or she can be safely released, and the second issue is whether the panel can be satisfied from the prisoners' previous conduct (including on previous releases) that the prisoner will comply with those conditions. Indeed, the Decision contained many conditions which the Respondent was obliged to comply with if released.
18. In this case, having considered all the evidence with care and in particular the representations of the Respondent's legal representative, I have concluded that the events disclosed by the Respondent's POM to the Applicant on 19 April 2024 and in particular the events on 14 April 2024 show clearly that the Respondent was acting in a serious and sustained breach of his licence conditions as instead of returning to his prison after work, he went to meet his sister and then meet his friends and celebrated a christening. In other words, it was clear that the Respondent was correctly then seen as an abscond risk and recalled.
19. I have no doubt that if this disclosure had occurred before the Respondent's hearing, a direction for release would not have been given as he could not be trusted to comply with conditions for his release and this means that the application to set aside the release direction succeeds.

Decision

20. The application for set aside is accepted.

Sir Stephen Silber
10 July 2024