

[2022] PBSA 5

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

Application

1. This is an application by the Secretary of State for Justice (the Applicant) to set aside the decision made by a panel of the Parole Board dated 16 August 2022 to direct the release of Steele (the Respondent).
2. The case was listed for an oral hearing on 30 August 2022 before a two-person Panel. However, on 28 July 2022 the Panel Chair adjourned the case and made directions with a view to concluding the case on the papers under Rule 21 Parole Board Rules 2019 (as amended)
3. There was no objection from either party and, after a further report from the Community Offender Manager (COM) and a security report, the Panel Chair concluded the case on the papers with a direction for release.
4. I have considered the application on the papers. These are the dossier of 154 pages (including the decision letter) and the application for set aside which was completed on a Stakeholder Response Form dated 22 September 2022.

Background

5. On 2 April 2019, the Respondent received a determinate sentence of 45 months imprisonment for burglary (with concurrent, shorter, sentences for affray and going equipped).
6. His sentence expires in January 2023.

Application to Set Aside

7. The application to set aside is dated 22 September 2022 and has been drafted and submitted by the Public Protection Casework Section acting on behalf of the Applicant.
8. The application to set aside is based on a positive drugs test from 16 August 2022 and an incident on 18 September 2022 where the Respondent is alleged to have assaulted two prison officers. This led to an adjudication for the positive drugs test and to the Respondent being placed in the segregation unit.



9. In addition, the allegations have been referred to the police. The outcome is not yet known.

10. It is argued that this incident constitutes a significant change in circumstances relating to the Respondent which would have meant that the panel would not have directed release if those events had happened before that direction was given.

Current Parole Review

11. The Respondent had been released under the Home Detention Curfew Scheme on 27 November 2020.

12. After 22 June 2021 he failed to stay in contact with his COM. His licence was revoked on 25 August 2021, although he then remained unlawfully at large until 1 October 2021.

13. The Respondent's case was referred to the Parole Board by the Applicant to consider whether it would be appropriate to direct his re-release following the revocation of his licence.

14. A member of the Parole Board considered his case on 20 December 2021 and directed his case to an oral hearing. As noted above, whilst the case was listed for an oral hearing, it was concluded on the papers in advance by the Panel Chair.

The Relevant Law

15. Rule 28A(1) of the Parole Board Rules 2019 (as amended) 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.

16. 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)).

17. 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 (i) information that had not been available to Board had been available, and/or (ii) if a change in circumstances relating to the prisoner after the direction was given had occurred before it was given.

18. Under Rule 28A(6) an application to set aside a decision must be made within 21 days of the decision. However, if the application relies on 28A(5)(b) i.e it relates to new information or a change in circumstances then it must be made before the prisoner is released.

The Reply from the Respondent

19. In accordance with the Rules, the Respondent was asked if he had any representations to make within 7 days.

20. A short response was received from the Respondent's solicitors saying that they did not have instructions. For that reason, I gave the Respondent a further week (until 13 October 2022) to make any representations that he would wish. Nothing had been received by 5pm on 14 October 2022, and so I am concluding the case at this stage.

Discussion

Eligibility

21. The application concerns a panel's decision to direct release following an oral hearing under rule 25(1)(a). The application was made prior to the Respondent's release and argues that the condition in rule 28A(5)(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

22. As stated above, the Respondent provided a positive drugs test for which he was adjudicated, as well as an allegation of violence against prison officers.

23. The application states that the Respondent '*regrets his behaviour*' and accepts that it is wrong, but he does not accept the full extent of the allegation.

24. Given the dates, I am satisfied that the above constitutes a change in circumstances which has occurred since the decision to release was made.

25. 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.

26. The most recent report from the COM was dated 10 August 2022. Due to the change in the Rules there was no recommendation, but the report is positive.

27. The report includes the following:

"The Parole Board will be aware of [the Respondent's] poor history of compliance in the community, but there are indications that his attitude towards professionals and his licence has improved.

His engagement with his [COM] since recall has been positive and he has completed all work available to him in custody".

28. The Respondent's behaviour in custody had deteriorated in July 2022, but by the time of the report there had been '*a significant improvement in [his] behaviour*'.

29.This was considered in the decision letter in the following way (emphasis added):

"2.10. Unfortunately, he then had a "tricky time" as a result of family issues. He received negative entries for attitude, lost his enhanced status and was dismissed from his employment on 18 July 2022. Adverse behaviour included misuse of his cell bell, refusing an order, and being suspected of being under the influence of an illicit substance; however, no adjudications resulted from these reports and there were no suggestions that he was violent or presented a risk of harm to others.

2.11. In early August he was commended for significantly improved behaviour, showing greater maturity and a positive attitude, despite issues about money relating to his canteen, and some (unspecified) issues with the OMU. His key worker highlighted his ability to calm himself down, willingness to help others and good manners."

30.The new information has the capacity to significantly change the assessment of risk. It (especially the allegation of violence) is evidence that is indicative of a raised level of risk and has the capacity to undermine the decision to release.

31.This can be seen in the reasons given for the decision, in particular at 4.2:

"However, in the year since he was recalled, there is clear and consistent evidence of improved behaviour in custody, and dealing appropriately with conflict and challenge. There is no evidence of violence since the index offence, either in custody or in the community".

32.It seems to me that the fresh evidence (if accepted) fatally undermines that reasoning. In light of that, 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.

33.Having decided that the 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.

34.Having considered the information, I am satisfied that it is in the interests of justice for the panel's decision to be set aside as otherwise he would be released in the knowledge that the decision was made without the significant information that has come to light.

35.Finally, the decision to set aside is a discretionary one. Therefore, even where the criteria in 28A(3) are met, that does not mean I must set aside the decision.

36.However, nothing has been put forward as to why, given my conclusion on Rule 28(3)(a) and (b), the discretion should not be exercised in that way. Further, I do not consider that there is anything on the papers that I have seen to suggest that I should not exercise that power.

Decision

37. For the reasons I have given, the application is granted, and the final decision of the panel dated 16 August 2022 should be set aside.
38. 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.
39. There is a good argument that the case should go before a Panel at an oral hearing so that all the matters raised (including the Respondent's explanation) can be discussed. However, given his sentence end date it is unlikely that any such hearing could be held before he is released automatically.
40. In those circumstances I consider that the case should be sent back to the original Panel (which would include both members), as it is best placed to consider the case again, and I direct that it does so.
41. On the evidence before me, I direct that the case should be decided on the papers, unless the panel considers that an oral hearing would be preferable, in which case it may set its own directions after the case has been remitted back to it for further consideration.

Daniel Bunting
18 October 2022