

[2023] PBSA 5**Application for Set Aside by the Secretary of State for Justice
in the case of Molloy****Application**

1. This is an application by the Secretary of State for Justice (the Applicant) to set aside the decision dated 14 December 2022 to direct the release of Molloy (the Respondent). The release decision was made on the papers.
2. I have considered the application on the papers. These are the paper decision, the dossier, and the application for set aside (12 January 2023).

Background

3. The Respondent received a determinate sentence of two years and four months in custody on 29 January 2021 following conviction for causing grievous bodily harm with intent to do grievous bodily harm. He also received a concurrent ten-month sentence for possession of an offensive weapon in a public place. These offences took place on 8 October 2020. His sentence expires in February 2023.
4. The Respondent was aged 16 at the time of sentencing. He is now 18 years old.
5. The Respondent was automatically released on licence on 24 September 2021. His licence was revoked on 31 December 2021, and he was returned to custody on 1 January 2022.

Application for Set Aside

6. The application for set aside has been drafted and submitted by the Public Protection Casework Section (PPCS) acting on behalf of the Applicant.
7. The application for set aside submits that there is new information and/or a change in circumstances sufficient for the panel's decision to be set aside.

Current Parole Review

8. The Respondent's case was referred to the Parole Board by the Applicant to consider whether to direct his release. This was his first review since recall.
9. The review was initially adjourned on 2 February 2022. The adjournment directions note that the Respondent was recalled following his arrest on 30 December 2022 on



suspicion of affray and possession of cannabis with intent to supply. It is reported that the Respondent was in a shop when a large-scale fight with a rival gang broke out, during which he was chased into another store, alone, and attacked with a knife. He sustained a laceration to his back. Further information was directed from the police.

10. A police report of 17 March 2022 noted that the affray was still under investigation, but that no further action would be taken on the matter of possession of cannabis with intent to supply.
11. Legal representations of 21 March 2022 on the Respondent's behalf sought re-release on the papers, or, in the alternative, an oral hearing.
12. The Respondent's case was directed to oral hearing on 20 April 2022; the hearing was listed for 7 December 2022.
13. On 30 November 2022, the Parole Board was informed that the police witness was not available for the oral hearing. The police witness noted "*the case which I am investigating [the Respondent] for is due to be dropped shortly. It has been agreed so just needs to be finalised.*"
14. Written legal representations sought release on the papers and submitted that it would be unfair to the Respondent in these circumstances to conclude on the papers with a negative decision.
15. The oral hearing was cancelled, and further reports were directed.
16. A police report of 8 December 2022 notes that no further action would be taken in respect of the affray and confirmed that no further action was taken in the matter of possession of cannabis with intent to supply.
17. A report from the Respondent's Community Offender Manager (COM) dated 12 December 2022, noted that police records showed that the Respondent was under investigation for affray (30 December 2021), conspiracy to supply Class A drugs (3 August 2020) and grievous bodily harm with intent (13 June 2020).
18. The panel directed the Respondent's release.

The Relevant Law

19. 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.
20. 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)).

21.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

22.No submissions were received on behalf of the Respondent.

Discussion

Eligibility

23.The application concerns a panel's decision to direct release following an oral hearing under rule 21(7). The application was made prior to release 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

24.The application notes that PPCS received information from the Respondent's Prison Offender Manager (POM) on 12 January 2023 which states that the Respondent had been made subject to a Court Production Order raised on 19 December 2022. This order requires the Respondent to attend court on 25 January 2023 in relation to the following charges:

- a) Grievous bodily harm with intent on 13 June 2020; and
- b) Affray on 13 June 2020.

25.It is also reported that the Respondent had refused to engage with his COM.

The test for set aside

26.In determining the application for set aside, I must consider whether the events described above would have affected the panel's decision to direct the Respondent's release.

27.The panel noted that its decision to release the Respondent was "very finely balanced". It also noted that his "failure to engage with his COM to discuss release

raises questions about future compliance...[but] if he engages, [the risk management plan] is capable of managing his risks."

28. While the decision engages with the matters which led to recall (and on which no further action was taken by police), it does not mention the other matters which were under investigation at the time. Although these were mentioned in passing in the COM report of 12 December 2022, I can find no other evidence of them elsewhere in the dossier. It also appears that they pre-date the index offence.
29. I am satisfied that if the panel had known that the Respondent was to be produced in court to answer charges of serious violence and had continued to refuse to engage with his COM, then its finely-balanced decision would have tipped and the direction for release would not have been given.
30. 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.
31. I am satisfied that it is in the interests of justice for the panel's decision to be set aside. While an ongoing police investigation (and indeed pending court proceedings) are not of itself a reason to justify continued detention, I consider that the matters before the court in this instance are relevant to risk.
32. The interests of justice would not be served if the release of a prisoner with a history of violent offending took place in the knowledge that he was refusing to engage with professionals charged with managing his risk in the community and was facing charges of further serious violence.

Decision

33. For the reasons I have given, the application is granted, and the final decision of the panel dated 14 December 2022 should be set aside.
34. 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.
35. 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.
36. In all the circumstances, I consider the current panel would have sufficient information to decide the case on the papers and make directions accordingly.

Stefan Fafinski
30 January 2023