

[2023] PBSA 3**Application for Set Aside by the Secretary of State for Justice
in the case of Chappell (No. 2)****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 24 November 2022 to direct the release of Chappell (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 (6 January 2023).

Background

3. The Respondent received a determinate sentence of three years and ten months in custody on 22 July 2019 following conviction for possession of class A drugs with intent to supply. His sentence expires in April 2023.
4. The Respondent was aged 32 at the time of sentencing. He is now 35 years old.
5. The Respondent was automatically released on licence on 6 May 2021. His licence was revoked on 11 August 2021, and he was returned to custody on 13 August 2021.

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 there is further information which has come to light after the panel took its decision which is sufficient for the 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 case proceeded to an oral hearing on 16 November 2022 before a two-member panel. The Respondent was legally represented throughout the hearing. Oral evidence was given by an officer standing-in for the Respondent's Prisoner Offender



Manager (POM) and his Community Offender Manager (COM). The panel directed the Respondent's release.

The Relevant Law

10. Rule 28A(1) 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(2), 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) 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)).
12. 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 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. Submissions received from the Respondent's legal representative argue there was no adequate reason for the information to have been brought to the attention of the panel, and, in any event, the matters raised are simply further examples of the Respondent making empty threats; a behaviour of which the panel was aware at the time it made its decision.

Discussion

Eligibility

14. 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 release and argues that the condition in rule 28A(5)(b)(i) is made out. It is therefore an eligible decision which falls within the scope of rule 28A.
15. This is the second application for set aside brought in this case. As established in **Walker (No. 2) [2022] PBSA 20**, second applications are permissible, but as a matter of principle, the same or similar concerns should not repeatedly be used to block a prisoner's release on an ongoing basis. Similarly, a follow-up application

should not rely on information or circumstances which were known at the time a previously refused application was submitted.

New information

16. The application notes that PPCS received information from the Respondent's POM on 4 January 2023 which stated the POM had recently returned from sick leave to find several security intelligence reports concerning the Respondent, some of which occurred after the release decision had been made.
17. Details of the security intelligence reports have been provided. There are 13 in total which date from 12 October 2022 to 8 December 2022.
18. The intelligence reports are all concerned with various discussions which took place between the Respondent and contacts in the community. They refer to violence and acquisitive crime, as well as indicating a poor attitude towards his COM.
19. The previous unsuccessful application for set aside was dated 9 December 2022. None of the matters within the security intelligence report were raised by the Applicant at that time.
20. The Applicant submits that there is further information, constituting a significant change in circumstances, which impacts the risk management assessment and has come to light after the panel took its decision on 24 November 2022.
21. The Applicant's submissions do not accurately reflect the legal test set out in rule 28A. Rule 28A(5)(b)(i) requires there to be information that was not available to the Board when the direction was given. The Applicant's submissions also unhelpfully conflate the limbs of rule 28A(5)(b) which clearly distinguish between new information and a change in circumstances. Finally, the Applicant's submissions argue that the further information impacts the risk management assessment. Again, that is not sufficient. Any new information must be of such weight that the direction given by the panel for release would not have been given if that information had been before the panel when it made its decision. It does not automatically follow that a change in assessment of risk would mean that a direction for release would be set aside.
22. Rule 28A(b)(i) is concerned with information "*that was not available to the Board when the direction was given*". There is an important distinction to be drawn between information which was not known (by either party) at the time of the direction and information which was known, but not put before the Board (or the other party).
23. Any security information dated on, or before, 24 November 2022 was known by the Applicant. It existed on the prison's security intelligence recording system. The decision records that the stand-in POM was questioned on security information. If a member of staff stands in for a witness, then it is incumbent upon them to be properly prepared. For a stand-in POM, this would include being up to date with recorded security information and being able to disclose it to the panel, even if their

lack of familiarity with the case would preclude them from commenting upon it in detail, or, indeed, at all.

24. The set aside mechanism is not one by which a party can retrospectively rectify a failure to present the totality of its evidence. I am therefore disregarding the earliest ten of the 13 reports relied upon by the Applicant.
25. I further note the submission on the Respondent's behalf that none of the matters within this application were raised when the first application for set aside was made. The first application was made on 9 December 2022 which is later than all reports relied upon by the Applicant.
26. The security information, none of which was new, therefore either pre-dates the panel's decision or the first application for set aside.
27. That said, the cut-off point within rule 28A(5)(b)(i) is 'when the direction was given'. Although (again, as a matter of principle, rather than law) it seems undesirable to permit an application which relies upon matters which were known at the time a previously refused application was submitted, a close reading of the rules does not strictly prohibit a party from relying on information in a later application for set aside which could have been raised in an earlier one.
28. I therefore confine my analysis to the security intelligence report dated 30 November 2022 and two reports dated 8 December 2022.
29. The report of 30 November 2022 refers to a conversation between the Respondent and his mother in which he expresses his frustrations with his COM and notes "*I'm not working with her*".
30. The first report of 8 December 2022 refers to a conversation between the Respondent and his mother in which he says, "*if he ever bumps into [his ex-partner's] new boyfriend then he would assault him*".
31. The second report of 8 December 2022 reports the Respondent seeking to procure the sending of messages to his ex-partner.

The test for set aside

32. 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.
33. The Respondent has a known history of making empty threats when agitated and has not offended violently in some seven years. The points raised in the application appear to be very much in keeping with this pattern. The Respondent will be released to designated accommodation where he will be under close supervision and subject to sign-in and curfew, together with drug testing and other conditions, including non-contact with names individuals considered to be at risk. His risks are known. The panel was not convinced that future non-compliance would be likely to lead to

serious harm being caused. It is the COM's responsibility to manage the Respondent under the terms of the extensive licence conditions set out by the panel, and to recall him if does not comply with his licence: the prospect of a future recall for non-compliance does not prohibit a release direction.

34. Taking the panel's careful analysis into account, I am not satisfied that the security information was so pivotal that the direction for the Applicant's release would not have been given if the panel had been aware of it.

35. The Applicant also submits that a full risk assessment is needed in light of the increased risks stemming from the Respondent's recent disclosure to his COM. This was the subject matter of the first application which was dismissed. It is not clear why the Applicant would raise this point again, having already been unsuccessful previously.

Decision

36. For the reasons I have given, the application is refused.

Stefan Fafinski
23 January 2023