

[2023] PBRA 33

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

Application

1. This is an application by the Secretary of State for Justice (the Applicant) to set aside the decision made by a single member panel (the panel) dated 31 March 2023 to direct the release of Clarke (the Respondent).
2. I have considered the application on the papers. These are the dossier of 324 pages (which included the panel's decision reasons) and the application for set aside.

Background

3. On 30 January 2018, the Respondent received a determinate sentence of 64 months' imprisonment following conviction for attempted robbery. His sentence expires in May 2023.
4. The index offence involved the Respondent, along with two co-defendants, disguising themselves and arming themselves with weapons and then going to the female victim's home and assaulting her.
5. The Respondent has previous convictions, including offences of violence. He was aged 28 at the time of sentencing. He is now 33 years old.

Application to Set Aside

6. The application to set aside is dated 15 May 2023 and has been drafted and submitted by the Public Protection Casework Section (PPCS) acting on behalf of the Applicant.
7. The application to set aside relates to the fact that the Community Offender Manager (COM) has been unable to obtain a bed in designated accommodation for release. Essentially, the Applicant relies on there being either new information or a significant change in circumstances as the basis for the submission that the decision should be set aside.

Current Parole Review

8. This was the Respondent's second review following his recall.



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9. On 25 September 2020, the Respondent was released at the automatic release point in his sentence as is required by the law. His licence was revoked and he was recalled to custody on 23 April 2021 as a result of being arrested for further offences.
10. The Respondent's case was referred to the Parole Board by the Secretary of State to consider whether it would be appropriate to direct his re-release following the revocation of his licence.
11. An oral hearing was convened on 6 December 2021. The oral hearing panel heard from the Respondent, his Prison Offender Manager (POM) and his COM. The Respondent was legally represented. By that stage it was known that the further allegations had not been proceeded with. The Respondent's COM supported re-release. However, the oral hearing panel concluded that it was necessary for the protection of the public that the Respondent remain confined and made no direction for release.
12. A member of the Parole Board considered the Respondent's case on 30 January 2023 by way of an annual review of the case as part of the member case assessment (MCA) process. That member deferred the case with a direction for an update from the COM regarding matters related to the risk management plan.
13. The panel then considered the Respondent's case on 31 March 2023. The panel had a dossier of 318 pages which contained reports from the COM (including the update which had been directed when the case was reviewed in January 2023) and the decision of the Parole Board which undertook the Respondent's first review following recall. The panel had also received representations from the Respondent's legal representative.
14. The panel felt that it had sufficient information to decide the matter on the papers. The panel directed the Respondent's release.

The Relevant Law

15. Rule 28A(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) 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). 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(3)(a)) **and** either (rule 28A(4):

- a) a direction for 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 given if:
 - i) information that was not available to the Board when the direction was given had been so available, or
 - ii) a change in circumstances relating to the prisoner after the direction was given, had occurred before it was given.

18. Under Rule 28A(5) an application to set aside a decision must be made within 21 days of the decision. However, if the application relies on 28A(4)(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. The Respondent, through his legal representative, indicated that he was not providing a response given he was due to be released in a few days at his sentence expiry date in any event.

Discussion

Eligibility

20. The application concerns a panel's decision to direct release following a paper review under rule 19(1)(a). The application was made prior to the Respondent's release and argues that the conditions in rule 28A(4)(b)(i) and (ii) are made out. It is therefore an eligible decision which falls within the scope of rule 28A.

New Information and/or a change in circumstances and the test for setting aside

21. When the panel directed release, it did so having been told that a bed space at designated accommodation was to be sourced (the Respondent having been found suitable by the team dealing with that type of accommodation), but it may take 6-12 weeks to obtain. Panels of the Parole Board no longer direct release for a specific date. If a prisoner meets the test for release, the panel directs release, and then it is a matter for the Secretary of State to give effect to that direction. It is accepted by the parties that it may take time to put the risk management plan in place, particularly accommodation, but the Secretary of State must do so as soon as is reasonably practicable. As noted on the front of the panel's decision (as with all directions for release):

"The Secretary of State must give effect to the direction of the Parole Board as soon as is reasonably practicable in all the circumstances including, in particular, the need to make arrangements in connection with any conditions that are to be included in the person's licence."

22. The Applicant relies on information received from the COM (received on 18 April 2023) that they have not been able to obtain a bed in designated accommodation and that one is not available before the Respondent's sentence expires. The COM reports that they could not obtain alternative suitable accommodation either. The

Applicant argues that this would mean that the Respondent would be released 'of no fixed abode'.

23. The Applicant submits that this is new information which was not available to the panel at the time and also that it constitutes a change in circumstances and, as such, the decision to release ought to be set aside.
24. It is clear from the decision that the panel directed release on the basis it would occur when a bed space at designated accommodation was obtained. The panel made specific reference to that part of the release plan at paragraph 3.4 of its decision. In addition, the panel listed licence conditions which directly relate to such a placement, including daily reporting to the staff at the designated accommodation. Therefore, I do not accept the Applicant's submission that he would be released without any accommodation at all, as the Secretary of State is required to make the necessary arrangements first, namely obtain the designated accommodation. If alternative suitable accommodation was found, then PPCS could put in an application to vary the licence conditions to remove and/or add any conditions due to the change in accommodation. I have not been provided with evidence regarding the enquiries which were made in order to find suitable accommodation. For example, I have not been told which areas of the country were considered when looking for a designated accommodation placement. In terms of alternative accommodation, it appears there may have been enquiries regarding a family member, but it is not clear from the information provided that all avenues have been exhausted, such as making a duty to refer or seeking CAS3 accommodation.
25. I do not accept that there has been a change in circumstances or that this is new information. The Respondent has not been deemed unsuitable for a bedspace for example, his situation remains the same. Furthermore, it would be premature in these circumstances to conclude there is no accommodation before the sentence expiry date when that date has not yet arrived. It is therefore incumbent on the Applicant to keep making those enquiries. The Applicant is required to continue doing so until the Respondent's sentence expires.
26. Even if this could be argued that this is new information/a change in circumstances, which I do not accept, it cannot be in the interests of justice to allow such a decision to be set aside in these circumstances. The Applicant has access to the entire designated accommodation estate covering the whole of England and Wales. This estate is one which is subject to change on a daily basis due to residents moving on or being recalled to custody. It would not be in the interests of justice to enable decisions to be set aside on information which can be subject to such change. To do so would, in essence, provide a course of action which would allow the Secretary of State to avoid his duty to take the steps required by law to give effect to independent decisions of the Parole Board.

Decision

27. For the reasons I have given, the application is refused, and the final decision of the panel dated 31 March 2023 remains.

Cassie Williams
23 May 2023

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