

[2023] PBSA 63

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

Application

1. This is an application by the Secretary of State for Justice (the Applicant) to set aside the decision not to direct the release of Thornhill (the Respondent). The decision was made by a panel after an oral hearing. This is an eligible decision.
2. I have considered the application on the papers. These are the dossier, the paper decision (dated 1 August 2023), and the application for set aside (dated 1 September 2023).

Background

3. On 21 September 2017, the Respondent received a number of determinate sentences as follows: possession of a handgun (imprisonment for six years), possession of a knife blade/sharp pointed article in public (machete, 12 months consecutive), possession of an offensive weapon in public (lock knife, 12 months concurrent), possession of ammunition without a certificate (six years concurrent), and administering a noxious thing with intent to injure, aggrieve or annoy (pepper spray, six months consecutive). He pleaded guilty to all offences. His sentence end date is reported to be in January 2025.
4. The Respondent was aged 22 at the time of sentencing. He is now 28 years old.
5. The Respondent was released on licence on 1 April 2021. His licence was revoked on 22 July 2022, and he was returned to custody the same day. This is his first recall on this sentence and his first parole review since recall.
6. The Respondent was recalled following his arrest on suspicion of possession of an offensive weapon, specifically a lock-knife, possession of cannabis and driving without a licence or insurance. He pleaded guilty to these offences in September 2022 and received a sentence of imprisonment for eight months.

Application for Set Aside

7. The application for set aside has been drafted and submitted by the Public Protection Casework Section (PPCS) acting on behalf of the Applicant.



8. The application for set aside submits there is further information constituting a significant change in circumstances which came to light after the panel made its decision. It is argued that the panel may not have reached the same decision had this new information been known.
9. The content of the application will be considered in the **Discussion** section below.

Current Parole Review

10. The Respondent's case was referred to the Parole Board by the Applicant to consider whether to direct his release.
11. An oral hearing took place on 24 July 2023 before a single-member panel. Oral evidence was taken from the Respondent's Prison Offender Manager (**POM**), his Community Offender Manager (**COM**) and the Respondent. The Respondent was legally represented throughout the hearing. The Applicant was not represented by an advocate.
12. The panel directed the Respondent's release.

The Relevant Law

13. Rule 28A(1)(a) of 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) 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 given if information that had not been available to the Board had been available, or
 - c) 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 has submitted representations via his legal representative which will be considered in the **Discussion** section below.

Discussion

17. The Applicant raises the matter of the Respondent being placed on report following an alleged incident in which it is said that the Respondent pulled an item out of his pocket and assaulted another prisoner with it on the head from behind. The incident has been referred to the independent adjudicator and there is no reported outcome. It is noted that the prison security department have stated that this is "*likely due to gang issues*".
18. It is also reported that, on a separate occasion, the Respondent allegedly made abusive and derogatory comments to a member of prison staff. There is nothing to suggest this matter has been taken any further.
19. The application for set aside then largely reiterates the Applicant's offending history and other matters that were known to the panel prior to the hearing.
20. The application concludes that the Respondent still has high intensity risk reduction work outstanding and that the recent incidents add to the risk of imminency on release, specifically, to rival gang members.
21. The Respondent first argues that the application has been made too late. It has not. Rule 28(5)(b) is clear that an application such as this must be made before the prisoner is released.
22. The Respondent argues that there has been no finding of guilt in relation to the matter that has been referred to the independent adjudicator, and that he denies the allegation. It is submitted that the alleged incident does not relate to risk of serious harm, that it is minor and that it would not have changed the panel's decision.
23. Moreover, it is argued that, if the alleged incident was due to gang-related issues, this area of risk had already been explored by the panel. The decision makes reference to other gang-related incidents in custody.
24. It is also argued that the discussion of the Respondent's index offence, custodial history and sentence plan is irrelevant as they have already been considered by the panel.
25. The alleged incident is unproven and, although the application for set aside was made in time, the primary incident upon which the Applicant is seeking set aside predated the application by almost a month. No outcome was provided in the application which suggests that there is still no finding of guilt. Had there been, the Applicant would have used it to strengthen their application.
26. The view of the security department that the alleged incident was "*likely due to gang issues*" is provided without any substantiation or reasoning. Although the

Respondent has a history of gang-related matters, it does not automatically follow that the alleged incident, which the Respondent denies, was gang-related.

27. Even if it was, the issue of gang-related repercussions in custody was considered by the panel at the hearing.

28. No further action appears to have been taken in relation to the alleged verbal exchange with a member of staff. I take this as reflective of its limited seriousness.

29. The rehearsal of the Respondent's offending history, index offence, recall and custodial conduct prior to the hearing is irrelevant.

30. Similarly, the matter of interventions was covered in the hearing. In fact, the Respondent's COM stated in the hearing that the preferred intervention was now of lower intensity than that raised in the application and did not need to be completed in custody prior to release. It is tenuous at best, and unsustainable at worst, to argue that a higher intensity programme is now required in custody on the basis of an unproven allegation.

31. Although there is new information that was not available to the panel when the decision was made, I do not find that it would have changed the panel's decision for the reasons set out above.

Decision

32. The application for set aside is refused.

Stefan Fafinski
14 September 2023