

[2023] PBSA 66

## Application for Set Aside in the case of Tusting

### Application

1. This is an application by the Secretary of State (the Applicant) to set aside a decision to direct the release of Tusting (the Respondent) following the revocation of his licence on 10 March 2023 and recall to custody. The decision dated 24 July 2023 was made by a single member panel of the Parole Board (the Panel) on the papers. It is a decision which is eligible for the setting aside procedure.
2. I have considered the application on the papers.

### Background

3. On 9 December 2021, the Respondent was sentenced to a determinate period of 2 years and 4 months imprisonment following his plea of guilty to non dwelling-house burglary.
4. The index offence was committed on 10 September 2021 when the Respondent broke into a service garage from which he stole a number of tools. He was also convicted of criminal damage to the property.
5. The Respondent was 34 years old when the index offences were committed and he had several previous convictions including convictions for theft, affray, possession of a bladed article, driving related offences, threatening behaviour, possession of a Class B drug and failing to comply with Criminal Justice Orders.
6. The Respondent is now 36. The current Parole Board review is his first following recall.

### Application to Set Aside

7. The application was submitted in writing on 25 August 2023 by the Public Protection Casework Section (PPCS) of HM Prison and Probation Service on behalf of the Applicant.
8. The Applicant submits that further information constituting a significant change in circumstances which impacts the risk management assessment has come to light since the Panel's decision and that this has an impact on the Panel's assessment of risk. This information is described as a number of outstanding and ongoing criminal matters that Probation were not aware of at the time of writing the Part C (*sic – it was the Part B*) Report. PPCS refer to the Respondent stating that an associate of



his told him that he had some work clearing a lock up, that he went along with it as he was out of work and he did not intend to burgle the lock-up.

9. The grounds for the application are considered further in the **Discussion** section below.

## Current Parole Review

10. The Respondent was released automatically on licence at the half-way point of his current sentence, namely 17 August 2022. His licence was revoked on 10 March 2023 for breaching the condition to be of good behaviour and not to behave in any way which undermines the purpose of the licence period. The Respondent was accordingly returned to prison on 20 March 2023.
11. Compliance with licence conditions by the Respondent is reported to have been sporadic, with supervision appointments being missed. He maintains that these clashed with his employment although no evidence of such employment has ever been provided.
12. It appears that no accredited offending behaviour work was undertaken by the Respondent prior to his release and there has been none since recall. Although the Community Offender Manager (COM) considers the Thinking Skills Programme to be necessary, she has been unable to confirm when it would be available in custody.
13. The circumstances leading to the Respondent's recall are that on 23 February 2023, he was stopped by police when in a car with false number plates linked to the theft of a catalytic converter. After he claimed that CCTV evidence would prove he was not in the vehicle but simply talking to one of its occupants, the police decided on that occasion not to arrest him.
14. However, on 6 March the Probation Service was informed that he had been arrested at the scene of a non dwelling-house burglary and bailed pending further enquiries. There is apparently CCTV evidence of his presence there and a check by the COM of his acquisitive crime tag showed him to have been in the vicinity. The decision was then taken to revoke his licence.
15. The COM referred in her Part B Report to the fact that the Respondent and his alleged accomplice had been confronted by a member of the public when removing items from the scene. He claimed to be clearing scrap metal. Stolen items worth £2000 were subsequently found in the van by the police.
16. Following recall, the Respondent's case was referred to the Parole Board by the Applicant to consider whether or not to direct his release.
17. Since his return to custody, there have been no issues about the Respondent's conduct and compliance.
18. The 12 April 2023 OASys Report assessed the Respondent as posing generally a medium risk of re-conviction by reference to static OGRS3 factors, and a similar risk,

adopting dynamic factors, in respect of both violent and non-violent re-offending. The Panel concluded that the risk of general re-offending was likely to be high. It agreed with the assessment that the risk of serious harm to the public generally, to children and to staff was medium. To a known adult such risk was low.

## The Relevant Law

19. 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.

20. The types of decision eligible for setting aside are listed in rule 28A(1). Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for setting aside whether made by a paper panel (rule 19(1)(a) or (b)) or by an oral hearing panel after a hearing under rule 25(1) or by an oral hearing panel making a decision on the papers under rule 21(7).

21. Under Rule 28A (4), a final decision may be set aside (a) if it is in the interests of justice to do so **and** (b) one or more of the conditions set out in sub paragraph (5) are satisfied. Those conditions are (a) the decision maker is satisfied that a direction to direct or not direct release would not have been made but for an error of law or fact or (b) the decision maker is satisfied that 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 that occurred after the direction was given, had occurred before it was given.

22. Rule 28A (9) provides that, where the decision maker directs that a final decision should be set aside, they must also direct that the case should be –

- (a) decided again on the papers by the previous panel or a new panel appointed under rule 5(1), or
- (b) decided again at an oral hearing by the by the previous panel or a new panel appointed under rule 6(2).

## Board Guidelines

23. There is nothing in the current Parole Board Guidance which is of assistance in this case.

## The Reply by the Respondent

24. By a message emailed to the Parole Board on 7 September 2023 the Respondent's solicitor opposes the application on the grounds that the information in support provided by PPCS is not new. The Respondent has not been charged, no charging

decision has been made and it is submitted therefore that the position remains materially unchanged.

## Discussion

25. There has been no error of law or fact and none has been argued by the Applicant.
26. The new information to which PPCS refer is the note to the Parole Board dated 3 August 2023 at Page 42 of the current dossier. This records the result of further enquiries by the Case Worker during which he was informed by the Officer in Charge (OIC) that the file is still with the CPS for a charging decision. The Case Worker states that the OIC remains confident that the Respondent will be charged.
27. That information cannot properly be described as new. No charging decision had been made at the time of the COM's Part B Report or at the time of the decision to release. The position remains essentially the same. What the OIC now says about a charging decision is opinion not fact. Nor can the explanation for the Respondent's whereabouts, described as having been provided by him, be properly described as new information.
28. There has been no other information provided which was not available to the Board at the time of its decision.

## Decision

29. In these circumstances, I am not satisfied under Rule 28A(5)(b) that the direction to direct the Respondent's release would not have been made if information that was not available to the Board when the direction was given had been so available. The application to set aside the decision of the Panel dated 24 July 2023 is therefore refused.

**HH Judge Graham White**  
**02 October 2023**