

[2023] PBSA 7

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

Application

1. This is an application by the Secretary of State for Justice ("the Applicant") under rule 28A(1) of the Parole Board Rules 2019 to set aside a decision of the Parole Board dated 14 December 2022 directing the release of Barnett ("the Respondent"). The application is made on the grounds 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 their decision on 14 December."*
2. I have considered the application on the papers. These are: (1) the dossier, now running to some 149 pages including the decision letter; (2) the application to set the decision aside, dated 20 January 2023; and (3) further information, provided at my request, in three emails dated 27 January 2023, which I will summarise below.

Background

3. On 14 October 2020 the Respondent received a determinate 3 year term of imprisonment for dwelling house burglary. On 24 March 2022 he was automatically released on licence at the half-way point of his sentence. On 25 April 2022, however, his licence was revoked and he was returned to custody the following day. If he is not released pursuant to a direction of the Parole Board his sentence will expire in September 2023.
4. The Respondent, who is now aged 30, has a substantial record of offending. In earlier years this included offences of dangerous driving, robbery and assault occasioning actual bodily harm. In recent years it has mainly consisted of dwelling house burglary, although there are two convictions for assaulting a police officer. The dwelling house burglaries are said to be driven by consumption of class A drugs – crack cocaine, heroin and valium.
5. The Respondent does not have convictions for violence against intimate partners, but there have been concerns about his behaviour towards an intimate partner. His recall in April followed a police call-out to a reported instance of violence towards this partner; it was alleged that he threw her phone at her, causing her to sustain a cut to her head. She did not, however, support a prosecution, subsequently telling the police that her injury had been caused by someone else.


Current Parole Review

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6. The Respondent's case was heard at an oral hearing by a single-member panel on 14 December 2022. The panel took evidence from the Respondent himself, the Prison Offender Manager ("the POM") and the Community Offender Manager ("the COM"). The panel was presented with a risk management plan which included a period in approved premises and GPS tagging.
7. The panel carefully assessed the circumstances of recall and the concerns relating to intimate partner violence. It was not possible to make a positive finding of fact concerning the allegation which led to recall, in the absence of any support from the intimate partner concerned. The panel also assessed the Respondent's custodial conduct: this included some negative comments relating to compliance issues, but there had been no proven adjudications.
8. The panel's conclusions sufficiently appear from the following paragraphs of the decision.

"4.1 [The Respondent] has a significant history of offending and there are many unproven allegations involving domestic violence – and it was this type of behaviour which led to his recall set against a background of non-compliance with his GPS tag requirements. The panel has been unable to make a finding in respect of the allegations leading to recall, but considers that whether or not the allegations are true his offending history, which involves behaviour which presents a high risk of causing serious harm to the public, requires careful management. He has a very poor record of compliance, and therefore greater oversight is essential to managing his risk. He is not currently in a relationship, and being placed in approved premises will ensure that relationship related risks and risks linked to his associates and lifestyle will also be carefully monitored along with his compliance. He will be supported to find move on accommodation following a period of 12 weeks in approved premises

4.3 There is no work recommended for him in custody, and the panel is satisfied that the risks are not imminent and work on relationships, thinking and decision making and his criminal, discriminatory and anti-social attitudes can be completed in the community. With this in mind, there is no reason to believe that releasing [the Respondent] now would increase his risk beyond his sentence expiry date.

4.4 In view of the panel's assessment of risk and in light of the conclusions set out above, the panel is satisfied that it is no longer necessary for the protection of the public that [the Respondent] is confined, and accordingly directs his release."

Request for Set Aside

9. The grounds of the application may be summarised as follows:
 - a. On 22 December 2022 the Respondent was seen to throw a punch at another prisoner.

- b. On 11 January 2023 a search of the cell the Respondent shared with another prisoner found a "leafy substance", suspected to be tobacco, and 3 concealed tablets, on a shelving unit which apparently contained the Respondent's property.
- c. On 12 January 2023 during an adjudication hearing the prisoner with whom he shared a cell accused the Respondent of punching him and slapping him on the face and body in an attempt to bully him into taking the blame for the suspected tobacco find.
- d. The Respondent was removed to the segregation unit where his behaviour on 13 January and 20 January 2023 included constant misuse of the cell bell for non-emergency reasons. He was placed on a Good Order and Discipline Review ("GOAD").

10.I asked for further information concerning these matters. This was provided in a series of emails on 27 January 2023. The following facts have emerged:

- a. As to a, the Respondent was not the subject of any adjudication proceedings. When the incident was investigated it was established that the Respondent and the other prisoner were friends; they both said that they were "messaging around"; no injury was caused; and the matter rested there.
- b. As to b, the Respondent was not the subject of any adjudication proceedings. The cell was shared; and the view was taken that there was no sufficient evidence as to who was in possession of the items concerned. I note that the "leafy substance" was described as being tobacco; and there is no evidence in the application as to the nature of the pills.
- c. As to c, the Respondent was the subject of adjudication proceedings, but a governor took the decision on 13 January 2023 not to proceed with them. The governor wrote "*charge not proceeded with based on timings in paperwork – could not have happened as it was stated that it did*". I note also that the prisoner who made the allegation was examined and there were no signs of injury.
- d. As to d, the Respondent has been returned from segregation to normal location without completion of the GOAD.

The relevant law

- 11.The decision to release the Respondent was taken under rule 25(1)(a) of the Parole Board Rules 2019. Such a decision is a final decision and is eligible for the set aside procedure: see rule 28A(1) of the Rules. I have been appointed as decision maker for the purposes of this application. I may decide the application for myself or I may delegate the role of decision maker to the chair of the panel which made the decision: see rule 28A(11).
- 12.Rule 28A(3) provides that the decision maker may set such a decision aside if satisfied that (1) one of the conditions in rule 28A(4) is applicable and (2) it is in the interests of justice to do so.

13. The condition on which the Applicant relies is set out in rule 28A(4)(b) which provides

"(b) the decision maker is satisfied that a direction given by the Board for the release of a prisoner 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 directions was given, had occurred before it was given."

The reply on behalf of the Respondent

14. No submissions have been received on behalf of the Respondent.

Discussion

15. The application does contain information which was not available to the Board when the direction to release was given; and it does evidence a change in circumstances, in that the Respondent was sent to the segregation unit. The conditions in rule 28A(4)(b) are met.

16. However, I must be satisfied that the direction for release would not have been given if the information had been available to the Board when the direction was given, or if the change in circumstances had occurred prior to the giving of the direction. I am not satisfied of either of these things. Nor am I satisfied that it is in the interests of justice to set the decision aside. My reasons are as follows.

17. As the law presently stands, where the Parole Board is faced with disputed allegations it can only take them into account in assessing risk in so far as it is able to make findings about them on the balance of probabilities: see the decision of the Court of Appeal in **Pearce, R (On the Application Of) v Parole Board of England and Wales & Anor** [2022] EWCA Civ 4.

18. If the panel had been presented with the information which I have summarised in paragraphs 9 and 10 above, it would in my opinion have been in no position to reach positive findings adverse to the Respondent relating to risk. It would have been faced with uncorroborated allegations which the prison had either not pursued to adjudication or had found wanting when pursued to adjudication.

19. The decision in **Pearce** is presently under appeal to the Supreme Court; oral argument has been heard and the decision is awaited. But even if the appeal in **Pearce** is allowed (so that the Parole Board is entitled to take into account a level of concern about allegations even where it is not possible to find facts about them on the balance of probabilities) it is not at all likely that the allegations would have carried significant weight relating to risk in this case. As noted above, the two allegations which are concerned with violence have not been pursued to adjudication for good reason. Moreover, no injuries were apparent. And the cell

search appears, so far as the material before me is concerned, to relate to tobacco and pills of an unknown nature.

20. For broadly the same reasons – that the allegations are unproven and in any event do not appear to me to carry significant weight on the question of risk - I consider that it is in any event not in the interests of justice for the decision to be set aside.

Decision

21. For the reasons I have given the application is refused.

David Richardson
3 February 2023