

[2023] PBSA 29

## Application for Set Aside by Sayers

### Application

1. This is an application by Sayers (the Applicant) under rule 28A(1) of the Parole Board Rules 2019 to set aside a decision of the Parole Board dated 17 April 2023 refusing to direct his release. The application is made on the grounds that the decision would not have been given but for an error of law. On 26 April judgment was handed down in **R (On the Application of Dich and Murphy) v Parole Board of England and Wales and another** [2023] EHC 945 (Admin) (“Dich”). It is submitted that the reasoning of the panel in the Applicant’s case is not consistent with that decision.
2. Rules 28A(3) and (4) of the Parole Board Rules, so far as relevant to this application, provide that a decision maker appointed by the Parole Board may set aside an eligible decision (as set out in rule 28A(1)) if the decision maker is satisfied that the direction not to release a prisoner would not have been made but for an error of law and that it is in the interests of justice to set aside the decision.
3. I have considered the application on the papers. These are: (1) the dossier, running to some 372 pages; (2) the decision dated 17 April 2023; (3) the application to set the decision aside, supported by written submissions by the Applicant’s representative; and (4) submissions on behalf of the Secretary of State for Justice (“the SSJ”).

### Background

4. On 15 April 2016 the Applicant was sentenced to an extended determinate sentence comprising a custodial term of 5 years and an extended licence period of 3 years. He had already served some months in custody on remand. He was eligible for consideration by the Parole Board for release on licence at the two-thirds point in this sentence; and entitled to be released on licence at the end of the custodial term (the conditional release date, or “CRD”). In the ordinary course, his CRD would have been in late 2020.
5. Unfortunately, however, he was released on licence on 15 November 2018 by mistake without his case being referred to the Parole Board. He remained in the community on licence and under supervision until 10 November 2021. The SSJ has referred his case to the Parole Board on the footing that the time the Applicant spent in the community does not count against his sentence; and on that footing he reaches the point at which he is entitled to be released on licence in July 2023 at which point the extended licence period will begin.



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6. The Applicant's index offences were committed against an intimate partner over a period of several months. They included repeated assaults and threats to kill. He denied the offences; and continues to deny them now.
7. The index offences were mainly committed when the Applicant was 25 years of age. By that time he already had a significant record of offending, including several offences of battery, possession of an offensive weapon, affray, harassment, and assault occasioning actual bodily harm.
8. While the Applicant was in the community he received a suspended sentence for sending messages (which were not of a threatening nature) to his former victim, in breach of a restraining order. He came to the attention of the police for other matters, including an alleged assault on a new partner, but he has no further convictions to his name. He worked regularly and attended appointments with probation services. He was eventually returned to prison on the ground that he had ceased to live at the address which had been approved; it was thought that he had moved in with his partner. He has undertaken no accredited course to reduce his risk and continues to deny his guilt of the index offences.

## Current Parole Review

9. As noted above, the Applicant returned to prison on 10 November 2021. His case was referred to the Parole Board on 18 January 2022. In due course, after some enquiries were made concerning current allegations and court proceedings, an oral hearing was directed. The hearing took place on 5 April 2023. It was chaired by an independent member and there was an independent member as co-panellist.
10. At the oral hearing both the Prison Offender Manager ("the POM") and the Community Offender Manager ("the COM") supported the Applicant's release on licence, considering that his risk was manageable in the community. The COM proposed a risk management plan which entailed an initial period in approved premises; a place had been secured at approved premises from 26 May until 26 August 2023. Thus he would remain in approved premises until beyond his CRD.
11. The panel did not accept that the Applicant should be released. In paragraph 3.12 the panel said the following –

*"3.12 The panel were unable to conclude that this plan would manage risk in the community. It may well do so for the period that [the Applicant] is in approved premises. In the future, if there are relationship problems which, as the panel thinks may be the case, are not shared with those charged with [the Applicant's] supervision, there is real risk to intimate partners and indirectly to any children present."*

12. The panel went on to say –

*"4.6 ....[The Applicant] has undertaken no offending behaviour work of significance and continues to maintain his innocence, not only of the index offending, but of any significant violence against women. Maintenance of innocence does not preclude the granting of parole but the panel, in the absence of evidence from accredited*

*programmes, must look elsewhere for evidence of reduction in risk. The time spent in the community goes some way to providing that evidence but the panel were not satisfied that that was a real test of a relationship under stress, where in the past, [the Applicant] has shown controlling and coercive behaviour. In his evidence to the panel, [the Applicant] did not display any particular level of insight into his risks and triggers for his previous violence. When discussing concerns around his prior relationships, and problems within them, [the Applicant] maintained the issues usually lay with attitudes and behaviours of his partners rather than accept any degree of personal responsibility for harm caused.*

*4.7 The panel noted that both professional witnesses recommended release but felt that they had given too much weight to [the Applicant's] professed motivations to maintain healthy relationships as against the evidence that he has in the past been capable of behaviour where, as the sentencing court found, his jealousy led him to assaulting his victim on frequent occasions with punches and kicks. He threatened her with a knife. He put his hands around her throat, causing her to choke and lose consciousness. On at least two occasions he threatened to kill her - on one occasion with a handgun placed into her mouth. The judge concluded that he intended to put her in fear for her life.*

*4.8 Taking all factors into account, the panel concluded that it could not be satisfied that it is no longer necessary for the protection of the public that [the Applicant] be confined and made no direction for his release."*

## **The Set Aside application**

13. As noted above, the application is founded upon the recent decision of the Administrative Court in **Dich**. It is pointed out that the Applicant is very close to his CRD when he will in any event be released on licence. It is submitted that since the panel was considering whether he needed to be confined by reason of his risk of serious harm after his release date, the panel was required to address the specific question identified in **Dich** – whether the risk of serious harm after the release date can be avoided or reduced by confinement prior to the release date. If that question had been addressed, the panel would have concluded that continuing confinement would not avoid or reduce any future risk.

## **The reply on behalf of the Secretary of State for Justice**

14. Submissions have been lodged on behalf of the SSJ. It is argued that the panel's decision "*is not affected by Dich.*" This argument is developed in the following way:

*"There were findings by the panel that continued detention would have a causal link to preventing and reducing risk. In paragraph 4.2, the panel determined that they were not satisfied the proposed risk management plan was likely to be effective in managing [the Applicant's] assessed high risk of causing serious harm in the community. Paragraphs 4.6 and 4.7 set out further reasons including that [the Applicant] has undertaken no offending behaviour work of significant and continues to maintain his innocence of the index offence and significant violence against women, does not display any particular level of insight into his risks and triggers for his previous violence and did not accept any degree of personal responsibility for*

*harm caused. Continued detention would enable [the Applicant] to continue to access programs and have opportunities to reduce his risk."*

## Discussion

### **Error of law**

15. The first question I must consider is whether the decision of the panel contains an error of law.
16. The Applicant is serving an extended determinate sentence. The Parole Board must direct his release if it is satisfied that it is no longer necessary for the protection of the public that he be confined: see section 246A(6)(b) of the Criminal Justice Act 2003.
17. The Parole Board took the view, until recently, that in assessing whether the statutory test was satisfied in the case of a determinate sentence it was only concerned to assess risk of serious harm until the prisoner was entitled to be released. This view was held to be incorrect in **R (Secretary of State for Justice) v Parole Board and Johnson** [2022] EWCH 1282 (Admin) ("**Johnson**"). There is no temporal element in the statutory test; risk beyond the release date is potentially relevant to the question whether it is or is not necessary for the protection of the public that the prisoner be confined.
18. In **Dich**, the question arose: how was risk beyond the release date relevant to this question? The Administrative Court answered this question in the following way:

*"17. In a non-life case, if continued incarceration up until the sentence expiry date will do nothing to avoid or reduce the risk thereafter, then it is not necessary for the protection of the public that the offender should be confined. The position is different if continued incarceration would reduce the risk to the public after the sentence expiry date (for example, by preventing the prisoner from taking steps that are preparatory to an offence, or by facilitating rehabilitative work that might reduce the risk post release). It follows that there must be a causal link between continued detention and prevention or reduction of risk."*
19. The Administrative Court went on to criticise certain aspects of Parole Board Guidance given in response to **Johnson**: see paragraphs 18-25 of **Dich**. In so doing it emphasised that *"the issue of a nexus or causal link ... is of critical importance where the Parole Board is concerned with risk arising outside the custodial term."*
20. Although, in paragraph 17 quoted above, the Administrative Court used the term *"sentence expiry date"*, it is clear that in the case of an extended determinate sentence the Administrative Court was referring to the expiry of the custodial term – see the use of this term in paragraph 19, also quoted above. This is the date at which the prisoner ceases to be confined, though he will remain subject to licence conditions and possible recall.
21. At the time of its decision the panel did not have the benefit of the decision in **Dich**. However, it represents the law, and I must consider whether the panel's decision is consistent with it.



22. The Applicant's case came before the panel at a time when there was just 3 months to the date when he would be entitled to be released. The plan was that he would be released to approved premises where he would stay until a date which was after his CRD. The panel was inclined to think that his risk could be managed there. I think it is inescapable that the panel was looking at risk of serious harm after the date when he was entitled to be released. It had in mind relationships "*in the future*": see paragraph 3.12, quoted above.
23. The panel did not ask itself the question, held in **Dich** to be of critical importance, whether there was a causal link between continued detention for the next 3 months and prevention or reduction of future risk. That was an error of law.
24. The submission on behalf of the SSJ set out above misses the two key points in **Dich**. Firstly, the continued detention with which the panel is concerned is the detention up to the date when he will be released anyway – in the Applicant's case in the very near future. Secondly, the question the panel must address is whether this continued detention will prevent or reduce future risk. This misunderstanding is clear from the last sentence of the submission, where it is argued that continued detention will enable the Applicant to continue to access programs and have opportunities to reduce his risk. His continued detention will only last until mid-July. It is quite unrealistic to suppose that this short period will enable the Applicant to access further programs and opportunities; and it was no part of the reasoning of the panel that it would do so. I reject the SSJ's submission.

### ***Would the result have been different?***

25. I must next consider whether the decision of the panel not to direct release would have been different if it had not made this error of law.
26. In my view the result would probably have been different. The panel does not appear to have thought that there was any significant risk of serious harm during the 3 months prior to expiry of the custodial term: see paragraph 3.12 quoted above. The POM and COM considered risk manageable; and the panel was concerned for the longer term. The question is therefore whether keeping the Applicant in custody for the remaining 3 months of the custodial term would have prevented or reduced his risk after the end of that term. The panel did not find, and there does not appear to be any reason to suppose, that he would have taken steps preparatory to the commission of an offence during that period or that any rehabilitative work would have been undertaken during it.

### ***Interests of justice***

27. I must then consider whether it is in the interests of justice to set the decision aside. It is generally in the interests of justice to set a decision aside if it has been taken in error of law and the result would probably have been different. In my view that general consideration applies in this case.
28. It might perhaps be said that, since the Applicant poses a high risk of serious harm to the public, especially intimate partners, and since he has done no work to reduce that risk, it is in the interests of justice to keep him in custody until the last possible



moment. But the interests of justice have to be considered against the legislative background. Parliament has enacted that extended sentence prisoners who have reached their parole eligibility date are to be released if it is not necessary for the protection of the public that they be confined. As clarified by **Dich**, this means that they are to be released if they do not pose a risk of serious harm during the custodial period and if keeping them in custody will not prevent or reduce their risk afterwards. It is in the interests of justice that the Applicant's case should be decided in accordance with those principles. It is inherent in the legislative scheme for extended determinate sentences that prisoners will sometimes be released when they remain a risk to the public.

## Outcome

29. It follows that I will set the decision aside. I must now consider whether to direct that the case should be decided on the papers and whether it should be decided by the previous panel or by a newly appointed panel: see rule 28A(8).

30. A governing consideration here is the short time until the Applicant's CRD: less than 8 weeks. In practice, even if I were to direct expedition of an oral hearing, it would be difficult to arrange in time; and it would be so close to the CRD as to be of little benefit to him. Accordingly I will direct a decision to be taken on paper.

31. I think the better course is to remit to the same panel, for two reasons. (1) The panel is already well acquainted with the case and in a position to take a paper decision without lengthy reading and decision writing. This is important given the time considerations which I have identified. (2) The panel did not have the advantage of the decision of the Administrative Court in **Dich**. It can now focus on the key issues with the benefit of that decision and this set-aside decision and address in particular (i) whether the risk to the public during the balance of the custodial period is manageable and (ii) whether continued detention during the custodial period will reduce or prevent risk to the public after the custodial period and reach conclusions, giving reasons in each case.

32. The panel's view in paragraph 3.12 quoted above was that the Applicant's risk might well be managed in the community while he was in approved premises. It is therefore very important for the panel to know whether a place in approved premises will be available before the CRD. I have directed a short, urgent report from the COM on this question. The panel should then convene as soon as possible to consider its decision.

## Decision

33. For the reasons I have given, I set aside the decision dated 17 April 2023.

**David Richardson**  
**22 May 2023**