

[2023] PBSA 39

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

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 McMurray (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 oral hearing decision (dated 21 April 2023), and the application for set aside (dated 5 June 2023).

Background

3. On 30 July 2010, the Respondent received an extended sentence comprising a custodial term of five years with an extension period of 10 years following conviction on two counts of robbery. He also received a determinate sentence of imprisonment for six months on two counts of handling stolen goods (receiving). On 14 July 2016, he received a further determinate sentence of imprisonment for two years following conviction for robbery. The determinate sentences are now spent. His sentence end date on the extended sentence is reported to be in January 2025.
4. The Respondent was aged 39 at the time of sentencing. He is now 52 years old.
5. The Respondent was most recently released on licence on 14 January 2021 following an oral hearing. His licence was revoked on 9 February 2021, and he was returned to custody on 25 May 2021. This is his third recall on this sentence and his first parole review since recall.

Application for Set Aside

6. The application for set aside has been drafted and submitted by the Public Protection Casework Section (PPCS) acting on behalf of the Applicant.
7. 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.
8. The content of the application will be considered in the **Discussion** section below.



Current Parole Review

9. The Respondent's case was referred to the Parole Board by the Applicant to consider whether to direct his release.
10. An oral hearing took place on 20 April 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.
11. The panel directed the Respondent's release.

The Relevant Law

12. 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.
13. 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)).
14. 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

15. Representations submitted by solicitors on behalf of the Respondent dated 15 June 2023 argue that the panel would still have directed the Respondent's release even if the information put forward by the Applicant has been available prior to the decision being made.

Discussion

16. The Applicant sets out the new information as follows:

- a) On 5 June 2023, the Respondent returned late from a period of home leave. He was under the influence of alcohol and provided a breath test of 86mg per 100ml of breath.
- b) The Respondent admitted to drinking alcohol on the train journey back to the prison.
17. The Applicant argues that this is evidence of the Respondent's propensity to disregard his licence conditions. His COM has expressed a lack of confidence that the Respondent would engage in effective supervision. It is said that the Respondent has become complacent following the release direction being made. The Applicant notes the panel considered the case to be finely balanced and had said that if the Respondent had been serving a standard determinate sentence, then the panel would not have directed his release at the time of the hearing.
18. The Respondent accepts that he drank alcohol on home leave. He says that he was not aware that the drinks were alcoholic and thought they were non-alcoholic energy drinks as the branding is very similar to many such not-alcoholic drinks. He says that he caught the wrong tram which caused him to miss his connecting train.
19. The Respondent also admitted to drinking alcohol to prison staff on his arrival and argues that this is further evidence of his openness and honesty.
20. Although the Applicant says that a full relapse into alcohol (and/or substance) misuse would result in an increased risk of serious harm, the Respondent argues that, while this is a reasonable logical statement, the consequences of such a relapse would have been known to the panel at the time the decision was made. The Respondent further submits that he did not enter into a full relapse: he consumed alcohol, stopped before becoming out of control and informed staff of doing so at the earliest opportunity.
21. It is also noted that the Respondent had no previous instances of consuming alcohol when in the community despite having had the opportunity to do so, and, as such, this was an isolated incident.
22. Finally, the Respondent argues that, even if these events had taken place after release into the community, he would not necessarily have been immediately recalled.
23. The first question I must answer is whether I find there to have been a change in circumstances relating to the Respondent. The Respondent's misuse of alcohol is a long-standing and significant factor in his offending history. Against that history, it is not surprising to learn that he did, in fact, drink alcohol when in the community. His COM has considered him to be open and honest, and it appears that the Respondent was open with staff on his return to prison after drinking. There is no change in circumstances here.
24. I must also consider whether the panel would not have made a direction for release had it known that the Respondent had drunk alcohol while in the community.

25. The decision notes that the Respondent's risk factors are well understood. When considering whether he needed further testing from open conditions, the panel accepted that he might fail a resettlement leave by returning intoxicated and there was the same likelihood of this happening if he was released into the community. It notes the risk management plan would detect the issue quickly and that remedial action in the form of recall could be taken as it has been in the past.
26. This is precisely what has happened and was therefore manifestly within the contemplation of the panel when it made its direction for release.
27. I therefore am not satisfied that the panel would not have made a direction for release if the new information has been available.
28. The release direction was made in the knowledge that any future lapse could be dealt with by recall if sufficiently serious. The Respondent is correct to say that a single lapse may not trigger recall in any event.
29. In conclusion, I find no change in circumstances or new information that would have changed the panel's decision to direct the Respondent's release.

Decision

30. The application for set-aside is refused.

Stefan Fafinski
3 July 2023