

[2023] PBSA 77

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

1. This is an application by the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Applicant) to set aside the decision (the Decision) made by an oral hearing panel (the panel) dated 20 September 2023 to direct the release of Devine (the Respondent).
2. I have considered the application on the papers. They are:
 - a. The Decision Letter dated the 20 September 2023;
 - b. An application from the Applicant to set aside the panel's decision, dated the 18 September 2023. This contained an error and the application was duly amended on 01 November 2023 (the Amended Application). The application now under consideration is the Amended Application; and
 - c. Communications from the Board to the Respondent's solicitor dated 23 October 2023 and 01 November 2023 requesting them to supply representations on the Amended Application by 8 November 2023.

Background

3. On 1 March 2018, the Respondent, who was 34 years old, received a determinate sentence of 6 years' and 4 months imprisonment following his conviction of an offence of wounding with intent to cause grievous bodily harm (the index offence) and consecutive sentence of 4 months' imprisonment for failing to comply with the terms of a suspended sentence order. The Sentence Expiry Date for these sentences is March 2024.
4. The Respondent committed the index offence when he and another man had repeatedly punched, kicked and stamped upon their victim who was also hit with broken bottles. The victim received life threatening injuries after being stabbed in the neck and he required surgery. This incident appears to have been a revenge assault for an earlier incident involving the victim.
5. The Respondent was released on licence on 18 December 2020, but on 5 May 2022 he was arrested for 2 counts of common assault, a count of criminal damage, 2 counts of assault occasioning actual bodily harm and a count of possession of cannabis. He was recalled to custody on 9 May 2002 before he was later convicted



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of 2 counts of common assault, criminal damage and possession of cannabis for which he received a sentence of 8 weeks' custody.

Current parole review

6. The panel considered the Respondent's case at an oral hearing on the 24 August 2023 and determined that he met the test for release. In reaching that decision, the panel considered a written dossier of evidence, and also heard evidence from the Respondent, his Community Offender Manager (COM) and his Prison Offender Manager (POM). The Respondent was legally represented at the hearing.
7. In deciding to order the release of the Respondent, the panel had noted that his conduct since recall had been largely satisfactory, the robustness of the risk management plan and the facts that the panel considered that the Respondent was likely to comply with the terms of his licence having learnt from his recall, that his mental health had stabilised and that he had done such work as he could to address his substance misuse problems in custody. The Respondent had been enjoying Enhanced status on the Incentives and Earned Privileges (IEP) scheme since November 2022 and he had secured employment in the kitchen and laundry departments in prison. The panel considered that there was no reason to believe that the Respondent would not comply with the requirements of his licence given his previous lengthy period of compliance when last in the community. In the Decision, the panel stated that it was accordingly satisfied that it was no longer necessary for the protection of the public that he should continue to be confined and therefore directed his release.

Application for Set Aside

8. In his application, the Applicant submits that further information constituting a significant change in circumstances which has an impact on the Respondent's risk management assessment had come to light after the Panel made the Decision on 20 September 2023. On 12 October 2023, PPCS (on behalf of the Applicant) had received information from a Senior Probation Officer at East of England probation, relating to an incident which had occurred on 3 October 2023 in which the Respondent assaulted a staff member in the following circumstances.
9. On 3 October 2023, the Respondent believed he was due to be released on that date but whilst on the Custodial Management System (CMS) the Respondent saw a message which stated that "*his date [for release] was incorrect*". The Respondent approached staff and became irate. Staff attempted to place him behind his door but he became "*aggressive and violent*" and this led to full control and restraint being used.
10. During the incident, the Respondent attempted to take hold of a prison officer's keys, but he was prevented from doing so.
11. Further, during the incident a Prison officer hurt their left leg and needed to attend the Accident and Emergency Unit. The Respondent was escorted to the segregation unit and was placed on report.

12. The Respondent has been charged with 3 adjudications and all of them have been adjourned so that he would be able to obtain legal advice. The adjudications relate to first an *"attempt to commit"*, second conduct which intentionally endangers the health or personal safety of others or by his conduct is reckless whether such health or personal safety is endangered and third the use of threatening, abusive or insulting words made to staff.
13. The Respondent has also become an *"escape risk"* because he attempted to take hold of an officer's keys.

The Relevant Law

14. Rule 28A(1)(a) 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. Similarly, under rule 28A(1)(b), the Parole Board may seek to set aside certain final decisions on its own initiative.
15. 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)).
16. 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

17. On 01 November 2023 the Respondent's legal representative was invited to make representations in response to the Amended Application on or before 8 November 2023. No representations have been submitted by the Respondent or his legal representative.

Discussion

18. I have concluded that the new information in the Amended Application is a relevant consideration and I am satisfied that the panel would not have been minded to direct release in this case had this new information been before the panel before it made the Decision.

Decision

19. I must now consider two matters. First, whether the case should be decided by the previous panel or a new panel and second, whether it should be decided on the papers or at an oral hearing.
20. Noting the previous panel's knowledge of this case, I consider that the previous panel would be best placed to consider the new evidence and I direct that it does so. The previous panel has the great benefit of having prepared and considered the case, carefully assessing the evidence before it at the time, reaching and documenting its decision.
21. On the evidence before me, I direct that the case should be decided on the papers, unless the previous panel considers that an oral hearing would be preferable, in which case it may set its own directions after the case has been remitted back to it for further consideration.

Sir Stephen Silber
27 November 2023