

[2024] PBSA 44

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

### Application

1. This is an application by the Secretary of State for Justice (the Applicant) to set aside the decision to direct the release of Hetherington (the Respondent). The decision was made by a panel on the papers. This is an eligible decision.
2. I have considered the application on the papers. These are the dossier (329 pages), the decision (dated 20 June 2024), and the application for set aside (dated 1 July 2024).

### Background

3. On 17 February 2023, the Respondent received a total two year determinate sentence following conviction after trial for impersonating a police officer and threatening to destroy or damage property while on bail and subject to a suspended sentence order.
4. He was automatically released on licence on 26 October 2023. His licence was revoked on 13 December 2023, and it is reported within the dossier that he was returned to custody on 27 December 2023. Legal representations within the dossier note that he was, in fact, returned to custody on 14 December 2023 and his sentence expiry date is October 2024.
5. The Respondent was aged 33 at the time of sentencing. He is now 34 years old.

### 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 would 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 or not it would be appropriate to direct his release.
10. The case was reviewed by a single member panel on the papers (the 'Duty Member'). The Duty Member directed the Respondent's release.

### The Relevant Law

11. Rule 28A(1)(a) of the Parole Board Rules 2019 (as amended) 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.
12. 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)).
13. 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

14. The Respondent has submitted a statement in response to the application which will be considered in the **Discussion** section below.

### Discussion

15. The Applicant's case centres around the fact that the Respondent is now subject to the 'Probation Reset' which means he will no longer be eligible for a placement in designated accommodation, nor subject to supervision by a Probation Officer for management of risk or to complete risk reduction work. (The Probation Reset is an organisational policy that has been implemented to alleviate workload pressures on the Probation Service).
16. The Applicant argues that the Respondent's risks cannot be managed without key parts of the risk management plan being in place.

17. The Respondent's case is concerned with the timing of the information regarding the Probation Reset and whether the change in circumstances did, in fact, take place after the release decision was made.

18. It is therefore first necessary to set out a chronology of events:

- a) 18 June 2024 10:40: The Respondent's Community Offender Manager (COM) emailed the Parole Board Case Manager enquiring whether there was a date for an oral hearing, and noting that "*...following probation reset policy changes, the [risk management plan] ... is going to look significant different as [the Respondent] falls into the cohort which means his supervision can be suspended on release. As such, this will also mean [designated accommodation] will not be included in his release planning.*" The COM sought advice from the Parole Board Case Manager.
- b) 18 June 2024 11:48: The Parole Board Case Manager replied, noting that the Respondent's review was to be concluded on the papers. The Parole Board Case Manager said that she was unsure how to deal with the new information regarding the Probation Reset and sought advice from PPCS.
- c) 20 June 2024 12:41: The Duty Member sent the release decision to the Parole Board Case Manager.
- d) 20 June 2024 12:56: The Parole Board Case Manager issued the release decision.
- e) 20 June 2024 13:15: The COM replied, reiterating the position from his email of 18 June 2024, and asking if the decision could be reconsidered.
- f) 20 June 2024 16:05: The Senior Probation Officer (SPO) asked the Parole Board Case Manager if the decision for release had been made taking into account the information shared in email on 18 June regarding the fact that the Respondent's case now fell under the remit of Probation Reset.
- g) 24 June 2024 09:54: The Parole Board Case Manager forwarded the SPO email to PPCS with a question from the member who made the release decision to ask whether PPCS (on behalf of the Applicant) intended to submit an application for set aside.

19. Next, it is important to establish the point at which the release decision was made. Following *R(Dickens) v Parole Board* [2021] EWHC 1166 (Admin), the Parole Board became *functus officio* at the point that the Duty Member sent the decision and reasons to the Case Manager: that is, 20 June 2024 at 12:41.

20. The question then becomes whether the change in circumstances (that is, the risk management plan being weakened by virtue of the Probation Reset) occurred after the decision was made. The COM certainly knew prior to the decision being made that the Respondent would be subject to the Probation Reset. It could also be argued that the Parole Board was also aware of this, since the Case Manager received the email. However, the Case Manager did not pass this information to the Duty Member.

Neither should they have done. By rule 16(3)(b), the Applicant has a duty to serve any information which he considers relevant to the case on the Board and the Respondent. In practice, this requires PPCS (on behalf of the Applicant) to serve any further relevant information. The email from the COM of 18 June 2024 did not constitute service of the information; although the COM is employed by the Applicant, he is not a party to proceedings as defined in rule 2.

21. Even if the information had been properly served (which, to be clear, it was not) the Duty Member made their decision in ignorance of it. My reading of rule 28A(4)(b) is that *'information that was not available to the Board when the direction was given'* means *'information that was not available to the panel appointed by the Board under rule 5(1) when the direction was given'*. If this were not so, it would be possible for a release decision to stand even if particularly egregious and compelling risk-related information had been emailed to a Case Manager, but not passed on to a panel before it made a release decision. This cannot have been the intention of Parliament and would have defeated the purpose of the set-aside rule.
22. Therefore, I find that (a) there was information that was not available to the Board when the direction was given and (b) the change in circumstances relating to the Respondent occurred after the direction was given.
23. That is not the end of the matter. In order to grant the application for set-aside, I must also be satisfied that the direction for release would not have been made but for the new information/change of circumstances and that it is in the interests of justice for the decision to be set aside.
24. I am satisfied that the panel would not have made a direction for release had it been aware of the Respondent being subject to the Probation Reset, particularly given its reliance on designated accommodation and COM supervision being available to detect early warning signs of escalating risk. I am also satisfied that it is in the interests of justice for the decision to be set aside, since those interests would not be served by releasing a prisoner who had been independently assessed by the Parole Board as requiring significant external controls to no fixed abode.

## Decision

25. For the reasons I have given, the application is granted, and the decision of the panel dated 20 June 2024 is set aside.

**Stefan Fafinski**  
**16 July 2024**