

[2023] PBSA 49

Application for Set Aside by Burton

Application

1. This is an application by Burton (the Applicant) under rule 28A(1) of the Parole Board Rules 2019 to set aside a decision of the Parole Board dated 18 June 2023 declining to release him. His case had been listed for an oral hearing on 22 June 2023 but the decision not to release him was made on the papers by the panel chair under rule 21(7) of the 2019 Rules and the oral hearing was cancelled. The application is lodged on the ground that the decision would not have been made but for an error of fact and that it is in the interests of justice to set it aside.
2. Rules 28A(3) and (4) of the 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 decision would not have been made but for an error of fact 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, now running to some 798 pages including the decision letter; (2) the application to set the decision aside dated 9 July 2023 with written supporting submissions from the Applicant's legal representative and (3) some further information which I have sought concerning a Healthy Sex Programme (HSP) course which the Applicant is undergoing, which is summarised in paragraph 22 below.

Background

4. On 13 May 2011 the Applicant received determinate sentences of imprisonment totalling 16 years for two sets of offences committed during the 1980s. The sentences followed two separate trials; in consequence he had been in custody of remand for a considerable period. On 10 July 2017 he was released on licence; but on 12 January 2018 his licence was revoked and he was recalled to prison. His sentence will expire in October 2024.
5. The first set of offences consisted of indecent assaults and gross indecency committed against a young child known to him. The offences included digital penetration of her vagina and forcing her to perform oral sex on him.
6. The second set of offences consisted of a rape, indecent assaults and false imprisonment committed in 1989 against a 21 year old woman whom he did not know. He attacked her at 11pm when she was about to drive off in her car; after



3rd Floor, 10 South Colonnade, London E14 4PU

www.gov.uk/government/organisations/parole-boardinfo@paroleboard.gov.uk

@Parole_Board



0203 880 0885

INVESTORS
IN PEOPLE | Bronze

first dragging her from her car he then took her back to the car, forced her to give him oral sex and raped her. He was eventually detected through DNA.

7. These offences did not become known for many years. In the meantime, in 2010, he was convicted of offences relating to indecent photographs of children and voyeurism. Moreover his recall in 2017 was the consequence of further offences relating to indecent images of children and possession of an extreme pornographic image, for which he received a 12 month determinate sentence and an indefinite Sexual Harm Prevention Order (SHPO). These offences became known because he and a fellow resident in approved premises were using the services of a local library to facilitate them.

The Current Parole Review

8. The Applicant's case was referred to the Parole Board in 2022 for the third time since his return to custody. During earlier referrals a constant theme was the need for him to undertake the HSP as core risk reduction work required before his release. The single-member panel conducting Member Case Assessment (MCA) directed a psychological review which confirmed that this was the appropriate pathway. The psychologist said that the Applicant would probably be offered an HSP place between April and June 2023 and that six months should be allowed for completion of the course, including post programme progress reviews – meaning, she said, that he was likely to have completed the course between October and December 2023 (dossier, page 728).
9. The MCA panel considered this information and on 2 August 2022 the MCA panel directed the case to oral hearing. Major considerations appear to have been that the Applicant had not had an oral hearing since March 2019 and that his representative suggested there might be alternatives to HSP which should be explored. It appears to have been contemplated that the hearing would take place in advance of the anticipated dates for the HSP course, for the MCA panel said that the case was ready to list.
10. In due course the Applicant's case was listed for an oral hearing to take place on 22 June 2023. In accordance with usual practice, the panel chair appointed for the hearing reviewed the papers and issued Panel Chair Directions (PCDs) in the run-up to the hearing. The PCDs are dated 19 May 2023.
11. The previous day, 18 May 2023, the Applicant had been transferred to his current prison for the HSP course. The panel chair was aware of this development. She believed, based on the psychological review and the MCA directions which I have noted above, that the course would take around 6 months to complete and she considered that a psychological risk assessment (PRA) would be required thereafter. Applying rule 21 of the Parole Board Rules 2019 in her PCDs she invited submissions from the parties as to whether the case should be completed on the papers in view of this development.
12. The Applicant's representative lodged submissions resisting this course. She said that the Applicant had been told that he was being "*fast tracked*" though she was not able to say what impact this might have on the length of the course and further reports. She suggested that the oral hearing on 22 June might be used as a



directions hearing or case conference “*in order to explore timeframes*”. She said that due to current delays in the system the Applicant would be unlikely to have a further review and would be seriously disadvantaged if the case was concluded on the papers.

13. As noted above, the panel chair issued her decision on 18 June 2023 concluding the case on the papers under rule 21, declining to release the Applicant. She gave the following reasons.

“Having carefully considered the dossier, including the legal representations, the panel chair has decided to conclude the review on the papers as an oral hearing is no longer required in the interests of justice. [The Applicant] has recently started a programme which has the potential of addressing his outstanding treatment needs. That programme usually takes six months to complete, following which there is a need for a psychological risk assessment and a report from the Community Offender Manager, which means that any adjourned hearing is unlikely to be able to take place for around 11-months.”

14. In reaching her conclusion that the programme would take 6 months to complete, the panel chair appears to have relied again on the information in the psychological review and the MCA directions. It does not appear that she sought any further information as to whether the Applicant’s case was being fast-tracked, and if so what the impact might be on the timescales she had in mind.

The grounds of the application

15. The grounds of the application are succinct. It is said that the panel chair made an error of fact: whereas she thought that the HSP course would be completed in 6 months, it will actually be completed by the end of August. If she had been aware of this information she would not have concluded the case on the papers.

The relevant law

16. The decision not to release the Applicant was taken under rule 21(7)(b) of the Rules. Such a decision is a final decision and is eligible for the set aside procedure: see rule 28A(1) of the Rules.
17. An application under rule 28A(1) must be brought within 21 days of the decision: see rule 28A(5)(a). That requirement has been satisfied in this case.
18. Rule 28A(3) provides that the decision maker may set aside such a decision 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.
19. The condition on which the Applicant relies is set out in rule 28A(4)(a) which so far as relevant provides

“(a) the decision maker is satisfied that a direction given by the Board for, or a decision made by it not to direct, the release of a prisoner would not have been given or made but for an error of ... fact.”



The reply on behalf of the Secretary of State for Justice (the Respondent)

20. The Respondent has indicated that no representations are to be made in respect of this application.

Discussion

Error of fact

21. The first question is whether there was an error of fact on the part of the panel chair.

22. I have caused enquiries to be made about the HSP course in which the Applicant is participating. The information received is as follows. The Applicant commenced the course on 15 June 2023. He is participating fully in it. The course is expected to conclude by 31 August. No report is produced on the course as such, but the course staff keep an activity log and the participant himself produces a document known as "My Journey Record" which he can share with others. Following the course there is a post programme review, which the course provider aims to complete within 6 weeks of the end of the course. Minutes are kept of the review and can be typed up as a priority if they are required for consideration of parole.

23. In summary, therefore, the HSP course is expected to be completed by 31 August and the post programme review by mid-October. That is 3 months rather than the 6 months which the panel chair believed was the likely duration of the course. The panel chair relied on information in the dossier which had been provided in 2022; but that information was not correct for the HSP course which the Applicant was taking. The panel chair made an erroneous factual assumption when she decided to conclude the case on the papers.

Impact of error of fact

24. The next question is whether the decision to conclude the case on the papers and not to release the Applicant would have been made but for that error of fact. In many cases it would make little difference if a course was likely to finish 3 months earlier or later. In this case, however, the question is not straightforward. I must unpack in a little detail the main considerations which in my view bear on it.

25. Firstly, the Applicant is assessed as posing a high risk of serious harm to the public and to children. In these circumstances I consider that the panel chair was plainly correct to say that a psychological risk assessment (PRA) will be required following the HSP course. She added on a full 5 months after the course for the assessment to be provided; but if she had known the end date of the course she may have been able to tailor directions for the psychological risk assessment to be provided a little more quickly. Nevertheless the additional time required for a PRA is a relevant factor.

26. Secondly, the Applicant's sentence expiry date is in October 2024. This is an important consideration. It is an unfortunate consequence of the present demand for accredited programmes that even high-risk determinate prisoners on recall often have to wait until close to sentence end before they can access a course which is



core risk reduction work. The Applicant had been waiting some time to access the HSP course and will complete it with only a year left on his sentence.

27. Thirdly, there are potential advantages both to the public and to the Applicant if he has a period on licence in the community prior to the expiry of his sentence. The potential advantage to the public is that a high-risk offender will be under the supervision of the probation service, first in approved premises and then in other housing, with licence conditions which may be enforced by recall and services to assist with his rehabilitation. This may be a better protection for the public than releasing him at the prison gate at the end of his sentence. The potential advantages to the Applicant correspond to some of these advantages to the public: he will have help with housing and other services to assist his rehabilitation which he may find more difficult to obtain at sentence end.
28. This is not, of course, to say that the Applicant is certain to be released after he has done the HSP course. He will only be released if he meets the public protection test. The Parole Board must take account not only of his risk during the balance of his sentence, but also of his risk after sentence end. In doing so the Parole Board is now guided by the decision of the Administrative Court in **Dich (R on the application of) v Parole Board of England and Wales** [2023] EWHC 945 (see, for a determinate case like the present, especially paragraph 17).
29. Fourthly, it is important to keep in mind Parole Board Guidance on Adjournments and Deferrals (July 2020). Relevant guidance includes the following. Cases should not be adjourned for more than 4 months unless there are exceptional circumstances: see paragraph 3.7. Cases should not normally be adjourned where the prisoner is about to commence an intervention, which is unlikely to be completed with post-intervention documentation and submission of follow-up reports within 4 months: see paragraphs 5.6 and 6.7. The general expectation is that in cases such as these the case will be concluded on the papers; but the Guidance makes clear allowance for exceptions where taking a different course is justified by the circumstances of the case.
30. Against that background, what decision would the panel chair be expected to take if she knew the correct position about the HSP course?
31. There were two options. One was to conclude the case on the papers; the other to set directions for a hearing after completion of the HSP course and the provision of a PRA.
32. A case could certainly still be made out for concluding the case on the papers. The HSP course including follow-up documentation will now be completed within 4 months; but as I have noted the panel chair was correct to say that in this case a follow-up PRA will be required. So an adjournment is bound to be for more than 4 months. I would, however, add that pressure on listing at the moment is such that any adjournment of an oral hearing which falls into the general pattern of listing may well be significantly more than 4 months.
33. The difficulty about concluding the case on the papers is that it leaves little room for the Parole Board to consider a release decision again a reasonable time before the sentence expiry date and for that decision to be implemented. It depends on



the Respondent again referring the case; on the case going through MCA assessment without problems; on availability of psychologists and on Parole Board listing; and even after the hearing on the provision of a place in approved premises. Experience shows that there is potential for delay currently in all these areas and there is frequently significant delay in the provision of a place in approved premises. It is therefore desirable to avoid unnecessary delay in a case where, as I have explained, it may be in the interests both of the public and the Applicant that he spends time on licence prior to the end of his sentence.

34. The advantage of giving directions now is that it avoids several months (or worse) of delay which would be occasioned by waiting for a referral from the Respondent and then going through MCA assessment. It significantly enhances the prospect that the Parole Board will be able to consider a release decision a reasonable time before the end of the sentence. This is a sound reason for giving directions rather than concluding on the papers.

35. When the panel chair thought that an adjourned hearing was unlikely to be able to take place in less than 11 months she was in truth in a difficult position. If she adjourned the case (1) she would have been well outside Parole Board guidance, and (2) a hearing would in any event have been of limited benefit by the time a release decision had been promulgated and an approved premises placement made available. In my view the panel chair would look at the matter differently if she knew that the HSP course would be completed, including post programme review, by October. In my view, given the sentence end date next year, she would be expected to give directions rather than conclude the case on the papers.

Interests of justice

36. The next question is whether it is in the interests of justice to set the decision aside. I am satisfied that it is. It is in the interests of the public as well as those of the Applicant that his case should be managed on the basis of correct information and that, so far as lies within the power of the Parole Board, there be an opportunity to consider his release a reasonable time prior to the expiry of his sentence.

Decision

37. For the reasons I have given I am satisfied that the application should be granted.

David Richardson
11 August 2023

