

## [2024] PBSA 24

### Application for Set Aside by Hinc

#### Application

1. This is an application by Hinc (the Applicant) to set aside the decision not to direct his release. The decision was made by a panel after an oral hearing on 13 February 2024. This is an eligible decision.
2. I have considered the application on the papers. These are the dossier consisting of 230 pages, the oral hearing decision dated 19 February 2024, the application to set aside dated 12 March 2024, and an email from the Public Protection Casework Section (PPCS) to the Parole Board dated 14 March 2024 stating that it had no representations to make in response to the application for setting aside.

#### Background

3. On 21 June 2019, the Applicant, received a determinate sentence of imprisonment of 5 years and 4 months following his conviction for sexual assault and sexual activity with a child under 16 years to which he had pleaded guilty. The offences were committed between November 2015 and March 2017.
4. The Applicant was aged 34 years at the time of sentencing. He is now 39 years old, and his victim was a 14-year-old girl.
5. He was automatically released on licence on 7 December 2021. His licence was revoked on 6 June 2023, and he was returned to custody on 9 June 2023. This is his first 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 Applicant's legal representatives.
7. The Applicant's case is that there were errors of fact contained in the decision not to direct his release and the panel "*would not have arrived at this decision but for the errors of fact contained throughout the parole dossier*" with the consequence that the decision to refuse to release the Applicant should be set aside.

#### Current parole review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider the Applicant's suitability for re-release.



9. The case proceeded to an oral hearing on 13 February 2024 before a single member panel which heard evidence from the Applicant, his Prison Offender Manager (POM), and his Community Offender Manager (COM), the Applicant was legally represented throughout the hearing. The Applicant applied for his release on licence from custody.
10. The panel did not direct the Applicant's release as it concluded that it remained necessary for the protection of the public that the Applicant remains confined.

### The Relevant Law

11. 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.
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. In an email from PPCS to the Parole Board dated 14 March 2024, the Respondent has offered no representations in response to this application.

### Discussion

15. In deciding if the alleged errors required that the decision not to release the Applicant should be set aside, the decision can only be set aside:
- (a) If any of these complaints relied on by the Applicant do actually constitute errors of law or fact on the part of the panel; and if so
  - (b) "*if it is in the interests of justice to do so*" and 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 law or fact"*.

16. It is noteworthy that setting aside cannot be ordered if the panel **might not have** or **would probably not have** arrived at the decision to refuse to release the Applicant but for the errors of fact or law. For an order for setting aside to be made, it is necessary to show that direction or the decision not to direct release **would not have** been given but for an error of law or fact.

#### *The first alleged errors*

17. The first alleged error arose from the fact that the Applicant was authorised to move items between commercial depots, but that he *"had not been approved to deliver to people's houses"*. The complaint against him is that *"despite this, it appeared he had done so as the representations mentioned that he was not allowed to enter the properties, suggesting that he had nonetheless delivered to houses, without approval"*.
18. The Applicant denies this, but he accepts that *"he made an error by stating that he was a delivery driver as it infers that he was travelling to customer houses,"* whereas he declares that *"he would only act within the region of what his COM had authorised which allowed for [delivery to] warehouses"*. No evidence has been adduced that he did deliver to customer's house and so this complaint of the alleged error has not been upheld.
19. For the purpose of completeness, I should add that it was stated in the application to set aside the decision of 19 February 2024 that a confirmatory statement would be provided by an officer of his employers, but it has not been forthcoming even though I have waited for it from 12 March 2024.

#### *The second alleged errors*

20. This alleged error was that the Applicant's COM in her evidence to the panel *"assessed [the Applicant's] current risk factors to be sexual preoccupation and compliance"*. The Applicant contends that *"this is an error of fact, and he disputes this"*, but no evidence has been adduced to show that this was an error of fact.
21. A further reason why the panel was entitled to accept the COM's evidence that compliance was a risk factor of the Applicant was that the COM explained that the Applicant had failed to comply with his duty to inform her of matters which led to his recall and this showed that his risk factors included compliance issues.
22. The panel was entitled to accept the COM's evidence that sexual preoccupation was one of the Applicant's risk factors bearing in mind that he had committed serious sexual offending against a young vulnerable girl who was raped and/or was sexually assaulted by the Applicant on a daily basis for about 18 months. The panel was entitled to agree with the COM and the OASys assessment that if the Applicant were to reoffend, there would be a high risk of serious harm to children. The COM assessed that the statistical risk scores represent an underestimate of risk as it appears to be based on the case of an offender who has only committed one offence whereas in the Applicant's case he had committed numerous offences over a period of 18

months. A further reason why it was not an error to regard sexual preoccupation as a risk factor of the Applicant was because of his *"lack of understanding of the impact of his offending on the victim"*.

23. Nothing has been adduced to show that the COM erred in her assessment of the Applicant's current risk factors or that she was not entitled to make those assessments. So, this complaint of the second alleged error cannot be upheld.

#### *The third alleged error*

24. This relates to the report of the allegation surrounding the Applicant's recall which was that when on 29 May 2023, the police were called to the address that the Applicant was then sharing with his parents, he was under the influence of alcohol, and he admitted to throwing a knife in anger. The Applicant contends that he clarified this during the oral hearing when he asserted that he did not throw the knife, but that he was using the knife in scraping paint off the wall.

25. I listened to the recording of the oral hearing in which the Applicant stated that he used the knife to scrape the paint off the wall. The panel also noted the recall report that stated when the police were called to the address that the Applicant was sharing with his parents, he admitted to throwing a knife in anger. He later clarified at the oral hearing that he had been using a knife in cooking and to scrape paint off a wall and this was accurately recorded in the panel's decision letter. The panel was entitled to accept the evidence that based on what was known to the probation service at the time, namely a report of throwing a knife, and taking into account his failure to be honest with probation, that his recall was appropriate. The panel correctly outlined the alleged incident as it was stated in the report and the Applicant's version of events and so this complaint cannot be upheld.

#### *The fourth alleged error*

26. It is alleged that the panel stated that *"the report in the dossier includes information about [the Applicant] being bullied, assaulted and under threat and also him displaying intimidating behaviour to prisoners and staff. [The POM] updated this with two more recent entries but neither was of significance."* Alcohol usage was mentioned in the decision but it was stated in the summary that *"it was not considered to be a risk factor"*.

27. The decision does not state if these allegations of intimidating behaviour to prisoners and staff or alcohol misuse were accepted as correct by the panel and they form no part of the reasoning in the decision for refusing to release the Applicant. Further, much evidence contained in the Applicant's ground on this issue was not adduced at the hearing. If there had been substance in these allegations of intimidating behaviour or alcohol misuse, it is very surprising that it was not the subject of adjudications against the Applicant or a reduction in his Enhanced status, especially as the alleged victims of the Applicant's misconduct were prison staff. So, this complaint cannot be upheld.

### **Conclusion on the Alleged Errors**

28.As I have explained, the decision not to release the Applicant can only be set aside if there are errors in the decision, that it is in the interest of justice to do so and it can also be shown that *"the decision not to direct the release of the Applicant would not have been given but for an error of law or fact"*.

29.I have explained why I have concluded that there has been no error of law or fact and so the application must be refused.

30.I have also concluded that even if that conclusion is wrong and the panel made any or all the alleged errors contended by the Applicant, the decision not to direct the release of the Applicant would still have been made to refuse to release the Applicant. That is because even if all or any these errors had been made, such errors would not have undermined or the panel's stated reasons for refusing to release the Applicant, which were that:

(a) having taken account of the Applicant's listed positive *factors* it *"took account of the following matters of concern [including]:*

- *the serious nature of the index offences;*
- *the sustained and persistent nature of the offending;*
- *the concerns about compliance arising from the circumstances leading to recall;*
- *Risk assessments including those indicating a high risk of serious harm to children;*
- *The lack of intervention to address offending behaviour;*
- *The COM's concerns about superficial compliance and lack of insight;*  
[and]
- *[the Applicant's] presentation to the panel in which he demonstrated limited insight into his offending and appeared to take little responsibility for his offending or recall"*.

(b) *"[it] remained concerned by [the Applicant's] offending history and minimisation of his responsibility"* and that;

(c) *"[it] placed particular emphasis on [the Applicant's] lack of insight and the COM's lack of confidence in being able to rely on [the Applicant's] honesty in managing his risk."*

31.These reasons will hereinafter be referred to as *'the panel's stated reasons'*.

32.For the sake of completeness, I should add that a setting aside order can only be made *"if it is in the interest of justice to do so"*, but I am satisfied that this requirement is not satisfied in this application because of *'the panel's stated reasons'*. This is a further reason for rejecting this setting aside application.

## Decision

33.The application for set side is dismissed.

**Sir Stephen Silber**  
**30 April 2024**