

[2024] PBSA 7

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

1. This is an application made 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 10 November 2023 to direct the release of Gray (the Respondent).
2. I have considered the application on the papers. They are:
 - (a) The Decision Letter dated 10 November 2023;
 - (b) An application from the Applicant to set aside the Decision, dated 21 December 2023.
 - (c) The Response to the application from the Respondent's solicitors dated 3 January 2024.
 - (d) A Request from the Parole Board to the Applicant dated 3 January 2024 for their comments on the Response to the application from the Respondent's solicitors and the Response from the Applicant dated 9 January 2024.
 - (e) The Respondent's dossier totalling 388 pages.

Background

3. On 10 December 2019, the Respondent, who was then 32 years old, received sentences of imprisonment totalling 5 years and 4 months' imprisonment for the offences of rape of a female aged 16 years or over (5 years' sentence) and of attempting/engaging in sexual communication with a child (4 months' consecutive sentence). The Sentence Expiry Date for these sentences is October 2024.
4. The Respondent committed the rape offence on his 17th birthday and he had previously been in a relationship with the victim of the rape offence who was then 16 years old. A time came when they were both sitting on a bench in an isolated area when the Respondent unfastened his trousers and pulled down the jeans of the victim to below her knees before raping her vaginally while she was repeatedly saying "no" to the Respondent. The Respondent denies that he raped his victim claiming that the sexual contact did not amount to penetration and that the sexual contact had occurred with the victim's consent.



5. The offence of attempting to sexually communicate with a child occurred when the Respondent communicated with a decoy who posed as a 13-year-old female on a communications app. They had regular contact and a time came when he asked her to meet for sex and sexual activities. The panel was unconvinced of the Respondent's account that he knew that he was speaking to a decoy rather than to a 13-year-old girl.
6. The Respondent did not have any previous convictions, but while serving the sentences of 5 years and 4 months' imprisonment, he was convicted of breaching a non-molestation order which had been in place to protect his former wife following her reports of domestic abuse by sending her written communications in August 2019. For this offence, he was sentenced to a consecutive sentence of 4 months' imprisonment. The Respondent's former wife now has an indefinite restraining order in place preventing any communication with her by the Respondent.
7. The Respondent was interviewed by the police in July 2023 after his former wife had made allegations of rape, but his Community Offender Manager (COM) confirmed that the police had determined that "*no further action*" would be taken by the police.
8. The Respondent was released automatically from custody on 7 January 2022 and for a number of reasons he resided in four different Approved Premises (Aps) within a period of just over a month. It was recorded that in spite of this, he "*had engaged in supervision well and has been of good behaviour during periods of [AP] placement*", but that he had experienced difficulties in obtaining his prescribed medication and as a result, had a significant impact on his mental health, but there is no evidence that he had committed any further offences.
9. In February 2022, the Respondent disclosed to his GP and others that "*he was experiencing a command voice instructing him to harm himself and others*". As a result of the evidence that the Respondent was hearing voices together with "*the limited mental health intervention and high risk status to staff and public*" of the Respondent, a decision was made by the AP to withdraw the Respondent's bed as his "*risk was assessed [as] unmanageable within the [AP]*" and his release from custody was thereby terminated because without a placement in an AP his "*risk [was] not assessed as manageable within the community*".
10. The Panel noted in its Decision that since his recall, the Respondent had not engaged in any work to address his offending behaviour. He declined to engage in an assessment for a programme called Horizon which aims to address sexual offending for male prisoners convicted of a sexual offence as he thought that he should not have to do it because he was maintaining his innocence and because he thought that this programme "*would be triggering in regard to his childhood trauma*" and that "*he was not in the right place to engage*".
11. Since his recall, the Respondent remained busy in custody through his employment and reading, as well as through the support he offered to other prisoners as a Shannon's Trust Mentor. His Prison Offender Manager (POM) informed the Panel that the Respondent's custodial behaviour has been "*of an excellent standard*". The

Panel did not place any weight on security intelligence which had a "low" reliability grading and which lacked corroborating evidence.

12. The Panel considered that the Risk Management Plan (RMP) for the Respondent was "robust". The COM considered that the Respondent should remain in custody as she believed that he should complete the Horizon programme before release and that he needed to be thoroughly assessed regarding his triggers.
13. The POM's professional opinion was that the RMP was "robust" and that the Respondent's risk could be managed in the community. The Prison Psychologist's report stated that the Respondent posed a medium risk of sexual violence and considered that he would benefit from engaging in work that would look at the Respondent's thinking patterns and emotions which had developed due to past traumas and that this could be completed in the community if there was a robust RMP and if all recommended support was available. She considered that in order to reduce the Respondent's risk, trauma focussed work was required. In her oral evidence, the Prison Psychologist explained that the Respondent's risk may be higher than she assessed in her written report and as she was not sure if his release could be managed in the community, she was not offering a professional opinion as to his suitability for release.
14. The Independent Psychologist recommended the Respondent's release both in his written report and in his oral evidence, explaining that the Respondent's risk of sexual offending had reduced to a moderate risk. He did not recommend that the Respondent should complete offending behaviour programmes or treatments. He believed that the Respondent had substantially reduced his risk of reoffending by bringing his mental health under control and a period of licenced supervision would be risk reducing as it would allow the Respondent to increase his protective factors. His opinion was that the Respondent's risk factors would be reduced longer term by the benefits of supervision and support from mental health and keyworker support. He therefore believed that the Respondent would be likely to be compliant. He explained that the Respondent had not had a programmes needs assessment and so he cannot say whether completing the Horizon programme to help prevent sexual re-offending is necessary. He explained that the preferred work to be undertaken in the community for monitoring, and that maps for change would be delivered one to one would be better for the Respondent.
15. The Panel having heard the Respondent's evidence considered that he demonstrated a good insight into his mental health and that as he is now stable, he is now intending to undertake work to address his childhood trauma. According to the Panel, the Respondent had been open and honest with professionals and had taken on board the advice of professionals. The Panel identified a number of the Respondent's protective factors, including his willingness to engage with his COM and a period of licensed supervision, his current stability in mental health and his compliance with prescribed medication, the custodial regime and his pro-social goals.
16. The conclusion of the Panel was that having noted the serious nature of the index offences, the harm caused to victims, his lack of previous convictions and the progress the Respondent had made during his sentence, his evidence, as well as

the evidence of the professionals, they preferred the well-reasoned opinions of the POM and the Independent Psychologist that the Respondent's risk could be managed under the proposed RMP and that he could be released safely. Especially as the RMP allows for the appropriate monitoring on licence and any increase in the Respondent's risk to the point of being unmanageable in the community is likely to have warning signs and the Respondent *"has demonstrated that he is able to be open as well as to raise concerns and seek help through professionals"*. So, the Panel was satisfied that the Respondent's risk was manageable in the community and that it was no longer necessary for the protection of the public that the Respondent remains in his custody, and it therefore directed his release subject to the licence conditions. It is that decision which is the subject of the setting aside application.

Application for Set Aside

17. The application to set aside is made on the basis that a direction for release would not have been made if either of two items of information which were not available to the Board had been so available.
18. The two items of information were that:
 - (a) There was a historic rape allegation against the Respondent in respect of which there is no evidence that it had been disclosed to the Parole Board prior to or at the hearing. After the hearing, on 14 December 2023, a Police Officer informed the COM that having spoken to another Police Officer there was an additional historic rape allegation against the Respondent that was still being investigated and was then currently with the Criminal Justice Unit (CJU) to go to the Crown Prosecution Service for *"an outcome decision"* (Ground 1).
 - (b) The Respondent had been in contact with a sex offender since the time of the hearing in that on 14 November 2023, the Respondent made a telephone call and having completed checks on the number the police confirmed that this number belonged to a registered sex offender. It is said that this new information, which was not available at the time of the hearing, raises concerns that if he is communicating with sex offenders who are in the community whilst he was in a custodial environment, this *"highlights [the issue of] whether he has the ability to comply in the community where restrictions are significantly reduced"* (Ground 2).

The Relevant Law

19. 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.
20. 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)).

21. 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

22. In respect of Ground 1, it is submitted that:

- (a) There is no information or a change in circumstances which was not available to the Board. At the hearing, the COM informed the Board that no further action was being taken by the police in relation to this allegation. It is then stated that *"however, the status of the allegation was known by the police at the time of the hearing, and this has not changed. The police knew [the Respondent] was under investigation for the time of the hearing and this remains the case. Therefore, rather than new information coming to light, there has been an error of fact due to the information provided by the [COM] to the Parole Board during the hearing"*.
- (b) An application to set aside on the basis that there had been an error of fact must have been made within 21 days of the decision being final. The Decision in the Respondent's case became final on 10 November 2023, while the application to set aside was made after the end of the specified 21-day period on 21 December 2023. In consequence, the Decision cannot be set aside.

23. It is submitted in respect of Ground 2 that the Respondent was not subject to a licence or other condition which prevented him having contact with sex offenders. Further, while in custody, given the nature of the environment, the Respondent would be bound to be in contact with sex offenders. Therefore, it is said that it is *"unjust to state that his current behaviour, including any current contact with sex offenders, is an indication of potential future non-compliance"*. Further, it is contended that the Respondent has given no indication through his behaviour before or after the hearing that he will not comply with the licence condition not to contact or associate with a known sex offender in the community. His position remains that he would inevitably be in contact with sex offenders as a result of being in prison with them.

Discussion

24. To succeed in either claim, the Applicant will have to show that his claim;

- (i) Satisfies one or more of the conditions set out in Rule 28(4);
- (ii) It is in the interests of justice to set aside the decision; and that
- (iii) The claim for setting aside is not time barred.

Ground 1

25. The basis of the allegation is that whereas the decision letter noted that the allegations of rape had been disposed of as there had been "*no further action*", the Respondent's case is that it is believed that this is a reference to a claim of historic sex without consent which was indeed "*no further actioned*" by police.
26. This present ground is in relation to a different allegation in which there is no evidence that it was disclosed to the Board prior to or during the hearing. On 14 December 2023, which was more than a month after the Board's hearing an officer stated that "*having spoke (sic) to [another police officer] I now know there is an additional historic rape allegation ... also linked to the [Respondent] that is still being investigated and currently with CJU to go to CPS for an outcome decision*".
27. I am satisfied that in the words of the Parole Board Rules a direction for release of the Respondent would not have been made if the information relating to the rape allegation offence had been available to the Board at the time. The reason for that is that it would have been essential in deciding whether it would have been safe to release a convicted rapist to know whether he had committed other sex offences or whether he was still under investigation for having committed any such offences including the outcome of any decision of any prosecution for the rape allegation offence.
28. For the same reasons, I am also quite satisfied that it must be in the interest of justice to set aside the decision to direct the release of the Respondent, as it would have been vital and essential for the Panel to know before deciding if he could be safely released, whether he was to be prosecuted or had been prosecuted or was under investigation for another offence of rape; such information would include the outcome of any decision on any prosecution for the rape allegation offence.
29. I am unable to accept the contention made on behalf of the Respondent that the claim by the Applicant is time barred as a claim for setting aside a decision of the Board must be brought within 21 days of the decision except that in cases which depend on a condition in paragraph (4) (b) of the Rules in which case the claim must have been brought before the prisoner had been released. The claim under Ground 1 depends on a condition under paragraph 4 (b) of the Rules and so the claim is not time barred as the Respondent has not been released.

Decision

30. In consequence, the Decision ordering the release of the Respondent must be set aside and as the direction to release the Respondent must be set aside under Ground 1, it is unnecessary to consider Ground 2 and I will adjourn consideration of it.

Stephen Silber
26 January 2024