

[2023] PBSA 10

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

### Application

1. This is an application by the Secretary of State for Justice (the Applicant) to set aside the decision made by an oral hearing panel dated 10 October 2022 to direct the release of Davis (the Respondent).
2. I have considered the application on the papers. These are the oral hearing decision, the dossier, and the application for set aside (undated).

### Background

3. The Respondent received a sentence for offenders of particular concern (SOPC) comprising a custodial period of eight years and four months with a one-year extension period on 3 October 2016 following conviction for rape of a girl under 13 to which he pleaded guilty. He was also sentenced to 40 months consecutive imprisonment for sexual assault of a female child under 13, and four years concurrent imprisonment for making an indecent photograph or pseudo-photograph of children. He pleaded guilty to the additional charges.
4. His parole eligibility date passed in March 2022. His conditional release date is in March 2026 and his sentence expires in March 2027.
5. The Respondent was aged 26 at the time of sentencing. He is now 32 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 further information which, it is argued, constitutes a significant change in circumstances which impacts the risk management assessment, and which came to light after the panel made its decision. It is argued that the panel may 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



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



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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. This is his first parole review.
10. The case proceeded to an oral hearing on 10 October 2022 before a two-member panel. The Respondent was legally represented throughout the hearing. Oral evidence was given by the Respondent's Prisoner Offender Manager (POM), his Community Offender Manager (COM) and a HMPPS psychologist.
11. The matter was adjourned for further information relating to the outcome of the Respondent's first overnight release on temporary licence (ROTL) which had been scheduled for the day after the hearing. This information was provided, and the Respondent's legal representative made further submissions in writing.
12. The panel directed the Respondent's release in a provisional decision dated 30 November 2022.
13. As the Respondent is serving an extended sentence, the panel's provisional decision was eligible for reconsideration for 21 days thereafter. With no application for reconsideration having been received, the panel's decision became final on 21 December 2022.
14. The Applicant made an application for the decision to be set aside. This was accompanied by an application for non-disclosure of the material on which the set-aside application was founded. The non-disclosure application was granted by a duty member on 8 February 2023, but permission was granted for a gist to be disclosed to the Respondent.
15. Submissions were made by the Respondent's legal representative challenging the non-disclosure application. It appears that, before any appeal on the non-disclosure was determined, the Applicant confirmed that the material on which it sought to rely for the set aside application was known by the Respondent and therefore the material could be disclosed to him.

## The Relevant Law

16. 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.
17. The types of decisions eligible for set aside are set out in rules 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)).

18.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 made if information that had not been available to the Board had been available, or
- c) a direction for release would not have been made 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

19.Submissions drafted by the Respondent's legal representative set out the Respondent's position. These will be considered in the **Discussion** section below.

## Discussion

### *Eligibility*

20.The application concerns a panel's decision to direct release following an oral hearing under rule 25(1)(a). The application was made prior to the Respondent being released and argues that the condition in rule 28A(4)(b)(ii) is made out. It is therefore an eligible decision which falls within the scope of rule 28A.

### *New information/change in circumstances*

21.The application notes that further allegations of sexual offending against a male child have been made. The alleged offences are said to have taken place around 2015-16 (this is around the time of the index offences). It is argued that this diversifies the risks posed by the Respondent to children in the community and that the treatment he has undertaken in custody would not have addressed those offending behaviours.

### *The test for set aside*

22.The application refers to both sexual activity in the presence of a child and sexual activity with a child. It may be that there are separate allegations; alternatively, the Applicant may have incorrectly used the offences interchangeably. These are separate offences contrary to sections 11 and 9 of the Sexual Offences Act 2003 respectively. Having noted the legal ambiguity in the application, I will continue on the broad premise that there has been alleged further sexual offending of some sort against a male child.

23.It is argued that the new allegation(s) have elevated the Respondent's risk of harm to a level that is not considered by his COM to be manageable in the community. However, the information submitted by the COM within the non-disclosure application states "[The Applicant] is already assessed as posing a high risk to children in the community and this has not increased as a result of the information".

- 24.The Applicant cannot therefore say that the Respondent's risk of harm has been elevated.
- 25.The Respondent notes that the allegations relate to the brother of the victim of the index offences and that the Respondent was interviewed by police in relation to the new allegation(s) on 10 February 2023.
- 26.I must now consider whether the direction for release would not have been given if the new information had been before the panel.
- 27.Following **R(Pearce) v Parole Board and Secretary of State for Justice [2022] EWCA Civ 4**, in order for a panel to take allegations of wider offending into account, it will need to examine the evidence to see if it can find any factual basis for those allegations. If a panel is in a position to make a finding of fact about the allegation it can do so, but if not, it must be careful not to go further than the background facts will allow. This is because panels must be careful not to adopt a 'no smoke without fire' approach.
- 28.At this point, there is an ongoing police investigation into the new allegation(s). There is no indication that the Respondent has been charged or convicted.
- 29.If this information had been before the panel, it would not have constituted evidence that was sufficiently substantial for the panel to have made a finding of fact, or assessed the weight to ascribe to it.
- 30.As a general principle, an ongoing police investigation is not of itself a reason to justify continued detention.
- 31.In directing the Respondent's release, the panel assessed his risk of sexual recidivism as medium but noted this may be an overestimate, given the Respondent's progress in custody. It also agreed with the COM that the Respondent presents a high risk of serious harm to children. It also did not consider the Respondent's risks to be imminent.
- 32.There are extensive licence conditions imposed upon the Respondent which limit his access to children. Each and every relevant condition relates to all children under the age of 18. There are equal restrictions concerning male and female children.
- 33.I do not find that the panel's decision would have been affected by the new allegation(s). The Respondent's risks as an intra-familial sex offender are known and were considered at the oral hearing. The allegation(s) add nothing to that profile, save a suggestion that the Respondent may prove a risk to both male and female children. These risks are covered by the gender-neutral conditions on the Respondent's licence.
- 34.It may transpire that the Respondent is subsequently charged and convicted of further offending. But the prospect of that is not a reason to set aside his release. By the COM's own evidence, the Respondent's risks have not increased since the panel made its decision. It is not argued that his risk of reoffending has become

imminent; neither would it have been sustainable to do so, given the historic nature of the allegation(s). The investigation can continue while the Respondent is in the community. Any future decisions regarding his liberty must be made on evidence. Any further interference with the panel's decision based on the evidence before me would be premature.

## **Decision**

35. For the reasons I have given, the application is refused.

**Stefan Fafinski**  
**24 February 2023**