

[2024] PBSA 30**Application for Set Aside by Saunders****Application**

1. This is an application by Saunders (the Applicant) to set aside the decision (the decision) not to direct his release, which was made on 15 March 2024 by a panel after an oral hearing on 1 March 2024. This is an eligible application.
2. I have considered the application on the papers which are the dossier consisting of 236 pages, the oral hearing decision dated 15 March 2024, the Application to Set Aside, the decision dated 25 March 2024 and an email from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) to the Parole Board dated 28 March 2024 stating that it had no comments to make in response to the application for setting aside.

Background

3. On 29 July 2014, the Applicant received:
 - (a) A sentence of 17 years imprisonment for an offence of attempt/rape of a female over 16 years of age;
 - (b) concurrent sentences of 17 years imprisonment for each of 2 offences of attempt/rape of a female under 16 years of age;
 - (c) concurrent sentences of 8 years imprisonment for each of 2 offences of indecent assault of a female under 14 years of age; and
 - (d) a concurrent sentence of 8 years imprisonment for an offence of indecent assault of a female under 16 years of age.
4. The Applicant was aged 51 years at the time of sentencing, and he is now 61 years old. The victim was aged between 11 and 18 years at the time of the offending.
5. The Applicant was automatically released on licence on 27 January 2023, but his licence was revoked on 9 June 2023 before being returned to custody on 21 June 2023. This is his first recall on his 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 Solicitors.



7. The Applicant's case is that *"there are [errors] of fact within the decision [and] the decision ...not to direct the release of [the Applicant] would not have been made but for [errors] of fact"*.

8. Those errors are that:

- (a) The Prison Psychologist and the Psychologist Panel Member both agreed that an HCR 20 assessment (a tool used by mental health professionals to assess the risk of violence) was not required, but the decision states that a future panel would require a Psychological Risk Assessment (PRA) including an assessment of future violence and violent ideation. The hearing should have been adjourned when the Applicant's legal representative questioned whether an HCR 20 was required, and the Panel had concerns (Ground 1).
- (b) The Community Offender Manager (COM) stated that the *"Maps for Change"* (MFC) programme was available in both custody and in the community. The Applicant's legal representative at the hearing disputed this saying that the MFC programme should be completed in the community with the COM. During the hearing, reference was made to the policy *"Management of Supervision of Men Convicted of Sexual Offences"* which supports the view that MFC is available in the community, and the complaint is that the Panel did not take this into account (Ground 2).
- (c) The decision stated that the PRA, which had been provided, failed to consider fundamental elements of the case. The Applicant contends that if the PRA was lacking, the hearing should have been deferred before the hearing and directions should have been made to ensure that a PRA was prepared to cover all the areas of the Panel's concerns (Ground 3).
- (d) The COM had suggested that the Applicant had provided varying versions about the events leading to his recall to the police, probation and the psychologist, but the Applicant contends that he gave the same account for his recall to his legal representative and the Prison Psychologist (Ground 4).

Current parole review

9. The Applicant's case was referred to the Parole Board by the Respondent to consider whether to direct the Applicant's release. The case proceeded to an oral hearing on 1 March 2024 before a three-member panel which comprised two independent members and a psychologist which heard evidence from the Applicant, his COM, his Prison Offender Manager (POM) and a HMPPS Psychologist. The Applicant was represented by his legal representative throughout the hearing. The Applicant applied for a direction for his release from custody.

10. The index offences were committed with regularity over a seven-year period during which the victim was aged between 11 and 18 years. The trial judge noted that the Applicant's offending was *"prolonged ...and.. very frequent... gross breach of trust"*. The trial judge also stated that the Applicant showed *"not a shred of remorse"* and that the Applicant had *"lied to the Court and perhaps even worse you have lied to the rest of the family"*.

11. At the hearing in front of the Panel, the Applicant continued to deny his offending and he said that K had made up the allegations. He asserted that the person who actually visited the children's bedroom at night when the index sexual offences were committed against K could have been a babysitter or another associate or police officers adding that his family "*were followed by police everywhere*".

Release and Recall

12. On 27 January 2023, the Applicant was released from [Prison A] to an Approved Premises. His release was subject to numerous licence conditions, including requirement not to be in contact with children without approval. He is recorded as acknowledging that he knew that contact with children was required to be through a contact centre; this acknowledgment is at variance with his later assertions to the effect that he was not aware of his licence conditions.

13. On 7 June 2023, the Applicant visited the home of his son ANS and his partner GS. Police attended the premises for unrelated reasons when the Applicant was present with his daughter AMS and her one-month-old baby. When the police reminded the Applicant of his licence conditions not to be in contact with children, he denied knowledge of the conditions. AMS was unwilling to talk to the Police.

14. The Applicant's licence conditions had been reviewed carefully with him, but he still denied knowledge of them, and he even intimated that the police had changed the licence conditions in order to recall him. He did not admit any fault on his part, but he displayed paranoia making other complaints about the police.

15. The Applicant's recall was authorised on 9 June 2023, and he eventually returned to custody on 21 June 2023. His recall was on the grounds that he had unsupervised contact with a child under 18 years of age and that he had not complied with his licence conditions because he was unaware of being recalled.

16. The Applicant asserted through his legal submissions that he had received a telephone call from AMS seeking assistance with her car, but he did not know that she would have her baby with her, and he did not enter the house. The Applicant's COM had heard a variety of reasons as to why the Applicant was in contact with AMS and her child.

17. The Applicant explained to the Panel that on 26 May 2023 police had broken into his car and had put an iTag in it. His evidence was that on the day of the events leading to his recall, he had visited probation and had continued to GS' home where he planned to meet AMS to assist with her car. He knew her children were at school, but because of stress, he had forgotten that she had a newborn baby. GS had asked the Applicant to visit to look after the fish in the absence of her partner, ANS, who had been ordered off site because of domestic violence. AMS took the baby into her house and the Applicant went down the side of the house to collect some of his son's tools. The Applicant insisted that he did not enter the house while AMS and her baby were present. This was different from the police's report to Probation.

18. The Applicant described the arrival of the police, and he attributed police hostility to an alleged incident when they asked GS about ANS, and he stated that his son "*doesn't*

know when to shut his mouth". According to the Applicant, it was *"the situation with [the baby]"* that led to his recall, and he was indignant about being accused of absconding stressing he had not been told he had been recalled.

19. The Applicant's COM commented on the Applicant's varying versions leading to recall on matters such as whether he thought no contact meant no physical contact, rather not seeing a child at all and whether he had been in the property at the same time as the baby.
20. On return to custody, the Applicant was initially held at [Prison B] before being transferred to [Prison C] and then moving to [Prison D] where his conduct had been good, but on 5 February 2024, he was given a suspended sentence at an adjudication for shouting goodbye to his grandchild at the end of a phone call with his daughter.

Security Intelligence - Abusive and Threatening Behaviour

21. The Panel was concerned about the language in security intelligence dated 21 November 2023 and they explored with the Applicant statements that *"[the Applicant] called an un-named female person a dirty little slag paedophile, a member of probation a fat c**t"* referred to *"the dirty little rat"* and *"what goes around comes around ... just like its sister, better off dead"*.
22. The Applicant has made many threats and allegations about somebody he referred to as a member of the police force MO'S. He alleged that this person had had been in the Applicant's house when he was absent, had damaged his car and had driven dangerously to try and harm him.
23. The Applicant's POM explained that she had not witnessed the hostility and aggression apparent in the security intelligence, but she acknowledged that the Applicant *"can come across aggressively"* if he fails to understand or disagrees with statements.

Risk Reduction and Progression

24. It was noted that the Applicant continued to deny his offending maintaining that the victim had fabricated everything because of problems in her marriage and that he denies ever being violent or aggressive towards any of his children.
25. The POM had encouraged the Applicant to complete another victim awareness pack after the pre-release victim awareness pack had helped the Applicant understand the *"ripple effect"*, but the Applicant resisted saying that he himself felt like a victim. The POM believes that the Applicant should undertake this work, but the Applicant told the panel that he did not understand it.
26. The Psychologist in her PRA concluded that the Applicant required treatment, but she recommended that this should focus on the risk factors contributing to the index offending and these would include emotional well-being, bereavement, depressive tendencies and paranoid ruminations. She also considered that work on improving healthy family relationships and improving self-worth would be important. The psychologist considered that those matters could be addressed through MFC with support from mental health. Her professional opinion was that the Applicant could be

released, but she stressed that a priority would be to improve the Applicant's ability to accept support and victim awareness as the need to work on stress management and problem solving.

27. The COM did not recommend release and emphasised that no work has been completed relating to the Applicant's risk factors and she had concerns whether the children in the Applicant's family would be safeguarded. Her evidence was that further work was needed on victim awareness, attitudes to professionals and helping the Applicant to address the roots of his hostility to authority. She recommended that MFC be completed in custody to improve the Applicant's understanding of issues including safeguarding. The COM explained that the Applicant's professional relationship with her had improved but he had asked for a change in COM, and she had provided him with the procedure.

Manageability of Risk

28. The Psychologist assessed the Applicant's risk of future sexual offending using the Risk of Sexual Violence Protocol and she noted the evidence of chronicity and escalation with both physical and psychological coercion. She also recorded extreme minimisation of sexual violence together with a lack of self-awareness and future and past problems with stress and coping. Further, her conclusion that the Applicant lacked social support in the community from family members or a wider network.

29. To the psychologist, this was "a *very difficult case*" with entrenched denial on the Applicant's part and "*his tendency towards paranoia especially when asked to reflect on his own behaviour*". Her professional opinion was that the Applicant could be released.

30. The Panel agreed with the assessment of Offender Assessment System (OASys) which is a tool that is used to identify the risk by and posed to the offender, which showed the Applicant posed a high risk of causing serious harm to children and a medium risk of causing such harm to the public and known adults.

31. Having considered the proposed risk management plan (RMP), the Panel "*was not assured that [it] would be effective in managing [the Applicant's] risk in the light of his lack of truthfulness or respect for authority and his risk factors not having been comprehensively addressed*".

Risk Factors

32. The Panel considered the Applicant's risk factors in the light of the evidence and the submissions of the Applicant's legal representative and concluded in relation to the risk posed by the Applicant that:

- (a) There were "*numerous measures and referrals to safeguard the family children, which were disregarded by [the Applicant] and [the Applicant's] dishonesty in telling police that he was unaware that he should not be having contact with AMS' baby*".
- (b) "*It is not persuaded there was no sexual interest element to [the Applicant's] offending in view of how persistent it was over many*

years" – the evidence was that *"the index offences were perpetrated over a seven-year period [when] the victim ... was aged between 11 and 18 years old"*.

- (c) *"The panel is concerned about [the Applicant's] rule breaking, hostile attitude to authority, anti-social attitude, complications and potential 'blind spots' in the family dynamics and possible collusion with family members"*.
- (d) The Applicant *"has not addressed his risk to others and continues to show contempt for authority in his attitudes to probation, and an aggressive view towards others, as well as an unhealthy tendency to paranoia"*.
- (e) *"The level of persecution and victimisation [the Applicant] appears to feel does not allow confidence that [the Applicant] would be able to manage his behaviour when challenged, and the risk of serious harm assessment does not take account of his admitted history of non-convicted violent offending, or of threatening and intimidating language recorded by officials"*.
- (f) *"The strength of feeling [the Applicant] maintains towards a police officer involved in his case in the past is concerning in terms of how active and prominent it remains"*.
- (g) *"The conviction shows that [the Applicant] has the capacity to be aroused by a child, and to cause psychological /emotional harm."*
- (h) *"It is, however, of concern that [the Applicant] remains so evidently fixated on matters in the past and that there appears to be a distorted element to his thinking, most likely related to his personality style"*.
- (i) As explained in paragraphs 12 and 14 above, the Applicant has stated that he was not aware of certain licence conditions and intimated that the police had changed licence conditions in order to recall him even though the conditions had been reviewed carefully with him and that he had earlier acknowledged that contact by him with children was required to be through a contact centre.
- (j) The Applicant suffered from *"his lack of truthfulness or respect for authority and his risk factors not having been comprehensively addressed"*.
- (k) Having considered the proposed RMP, the Panel *"was not assured that [it] would be effective in managing [the Applicant's] risk in the light of his lack of truthfulness or respect for authority, and his risk factors not having been comprehensively addressed"*.

33. These will hereinafter be referred to collectively as *"the Applicant's Risk Factors"*.

Conclusion of the Panel in the decision

34. The Panel in its decision concluded after considering all the evidence not to direct the Applicant's release as it was "*not satisfied that it was no longer necessary for the protection of the public that [the Applicant] remain in prison*".

The Relevant Law

35. 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.

36. 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)).

37. The decision refusing to release the Applicant is a decision may be set aside if:

- (a) The grounds relied on by the Applicant do actually constitute errors of fact or law on the part of the panel; and if so
- (b) "*if it is in the interests of justice*" to set aside the decision; and
- (c) the decision maker is satisfied that... a decision [made by the Board] not to direct the release of a prisoner would not have been made but for an error of fact or law.

38. Condition (c) is of great importance in this application, and I will consider it in respect of each of the Applicant's grounds which I uphold to ascertain if the decision not to direct the Applicant's release would not have been made but for the error of the panel. Further I will also consider later in this judgment (irrespective of my decision on individual grounds) whether if all the grounds relied on by the Applicant for setting aside the decision were correct, the decision not to release the Applicant would not have been made.

39. In dealing with the grounds for setting aside, it is necessary to stress three matters of basic importance. First, the setting aside mechanism is not a process in which the judgment of the panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the setting aside process was entitled to substitute his own view of the facts in place of those found by the panel unless it is manifestly obvious that there was an error of act of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

40. Second, where a panel arrives at a conclusion exercising its judgment based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be set aside unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the Panel. Third. In many cases, there can be more than one decision that a panel can be entitled to arrive at depending on its view of the facts.

41. 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

42. The Respondent has offered no representations in response to this application.

Discussion

Ground 1

43. It is contended that the case should have been adjourned when the Applicant's legal representative questioned whether a HCR 20 was required and the response of the prison psychologist was that the assessment had not been carried out as there was no evidence of any violence being used. Indeed there was no evidence that the Applicant had learnt during his release or one-to-one work not to be violent toward someone who annoys him.

44. When the panel were asked by the Applicant's legal representative whether a HCR 20 was required at that stage, the psychologist panel member said that it was not required, and the Chair agreed. There are five alternative reasons why this ground cannot be accepted.

45. First, nothing has been put forward to show how and why a HCR 20 assessment would or could have assisted the panel in making its decision or whether it would or could have led to the release of the Applicant.

46. Second, nothing has been put forward to show that the prison psychologist was wrong to contend that it was a valid reason not to require a HCR 20 because there was no evidence of any form of violence.

- 47.Third, it has not been shown that the Psychologist Panel Member and the Chair were not entitled to conclude or were wrong to conclude that a HCR 20 was not required.
- 48.Fourth, where as in this case, a panel has arrived at a decision on what further reports were not required exercising its judgment based on the evidence before it and having seen and heard the witnesses, it would be inappropriate to direct that the decision be set aside unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. No such compelling reasons have been put forward or suggested.
- 49.Fifth, there is no merit in the Applicant's contention that just because it was stated in para 4.10 of the decision that a **future** panel would find a PRA "*of assistance*", this meant that the present panel ought to have decided that there should have been an adjournment of the present proceedings so that the Applicant could undergo a further PRA. The purpose of the further PRA would be to assess how the Applicant would have changed after future work had been completed to address his attitudes to authority and his personality features. That would be a different situation from the present position on which the panel had much information, and it has not been explained as to what further information was needed.

Ground 2

- 50.This ground is that the Panel failed to take into consideration that the Applicant could have completed the MFC in the community with a COM. First, I do not agree as there is no basis for concluding that the Applicant can **now** be safely released into the community to do the MFC programme. The Applicant's risk factors set out in paragraph 32 above constitute a formidable case why the Applicant cannot be safely released and the Applicant's case does not undermine these submissions which include his "*lack of truthfulness or respect for authority and his risk factors not having been comprehensively addressed*" and the panel's unchallenged conclusion that his RMP would not be effective in managing the Applicant's risk.
- 51.A further reason for rejecting this ground is that there is no evidence of what benefits there would be for the Applicant completing the MFC in the community as compared with completing it in custody.

Ground 3

- 52.This ground is that the decision letter stated that the PRA which has been provided by the Psychologist failed to take account of fundamental features of the case. The Applicant contends that if the hearing was lacking, the hearing should have been deferred and directions should have been made to ensure that a PRA was prepared to cover all areas of the Panel's concerns.
- 53.This Ground fails to appreciate that the Psychologist gave evidence, and she could have been asked when giving evidence about all elements of the case which it is contended she should have covered in his report or even if these problems had arisen after she had given evidence he could be recalled

Ground 4

54. This Ground is that the COM had suggested that the Applicant had provided varying versions about the events leading to his recall to the Police, Probation and the Psychologist, but the Applicant contends that he gave the same account for his recall to his legal representative and the Prison Psychologist. I am not in a position to determine whether the Applicant gave these varying accounts, but it does not seem to me to matter.
55. That is because, having considered all the evidence with care, I have concluded that even if the Applicant's case on this ground is correct, the decision not to direct the release of the Applicant would still have been given. The reason for that is that the Applicant's risk factors set out in paragraph 32 show the overwhelming case for not releasing the Applicant and that even if the errors relied on by the Applicant in Ground 4 are correct, there would still be an overwhelming case for not ordering his release.
56. That is because of serious concerns about the conduct of the Applicant in so many different areas which I will summarise in no particular order of importance. First, there was his blatant disregard of measures and referrals to safeguard the family children. Second, the Applicant has shown a lack of truthfulness. Third, he has shown a lack of respect for authority in many different ways. Fourth, his many risk factors have not been addressed. Fifth, his convictions show a capacity to be aroused by a child and to cause psychological harm, especially in the light of the index offences, which comprised serious sexual offences committed over a seven-year period when his victim was aged between 11 and 18 years old. Sixth, the panel were not assured that the proposed RMP would be effective in managing the Applicant's risk in the light of his lack of truthfulness or respect for authority and the fact that his risk factors had not been comprehensively addressed.
57. I have also considered whether I would have ordered the Applicant's release if I had found that **all** four grounds relied on by the Applicant were correct. I concluded that I would not have ordered his release for the reasons set out in the Applicant's Risk Factors.

Conclusion

58. The Application is refused.

Sir Stephen Silber
30 May 2024