

[2023] PBSA 44

## Application for Set Aside by Burke

### Application

1. This is an application by Burke (the Applicant) to set aside the decision made by a Panel of the Parole Board (the Panel) following an oral hearing resulting in a refusal to direct his release.
2. I have considered the application on the papers. These are the dossier currently comprising 294 pages, the oral hearing decision (DL) dated 29 May 2023, the application to set aside dated 16 June 2023 and representations on behalf of the Secretary of State (the Respondent) by way of a stakeholder response form (SHRF) dated variously 20 and 22 June 2023 containing responses, apparently from the Community Offender Manager (COM), which are also attached by way of commentary to the application to set aside.

### Background

3. On 22 July 2014, following a trial, the Applicant, who is currently 39 years old, received a determinate sentence of imprisonment totalling 13 years for rape of a female aged 16 years or over x7 (count 1 being a specimen) and one count of sexual assault on a female by penetration (“the index offences”).
4. The Applicant was released on licence in July 2020 and was recalled and returned to prison in July 2022. This was the first review since recall. The Applicant’s sentence expires in January 2027.
5. The Applicant was convicted of raping the victim repeatedly over two and a half years. The Sentencing Judge found that she was young and vulnerable and that the Applicant carried out an extended period of seriously intimidating threats and harassment after she informed him that she no longer wished to be in a relationship with him. She is said to have suffered serious physical and emotional harm as a result of his actions.
6. The Applicant maintains his innocence of the index offences and describes his sexual activity with the victim as consensual and he perceives himself to be a victim of injustice.



7. The Applicant was recalled following allegations made to the police by another woman (SS) who complained that she had been in a controlling and coercive relationship with him for a number of months. He had not disclosed this relationship nor his possession of an unregistered mobile phone.

### **Current Parole Review**

8. The Applicant's case was referred to the Parole Board by the Respondent to consider whether to direct his release. The review was heard on 23 May 2023 and the Applicant was legally represented throughout the hearing. The Panel made no direction for release.

### **Application for Set Aside**

9. The application to set aside is dated 16 June 2023 and made on behalf of the Applicant by his solicitors who seek to argue that there have been a number of errors of fact. No errors of law are relied on.

### **The Relevant Law**

10. Rule 28A(1) 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(2), the Parole Board may seek to set aside certain final decisions on its own initiative.
11. The types of decisions eligible for set aside are set out in rules 28A(1) and 28A(2). 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)).
12. A final decision may be set aside if it is in the interests of justice to do so (rule 28A(4)(a)) **and** either (rule 28A(5)):
  - 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**

13. The Respondent has made representations in response by way of an SHRF and comments attached to the application itself.

## Discussion

14. The application concerns a Panel's decision not to direct release following an oral hearing under rule 25(1)(b). The application argues that errors of fact are made out for the purposes of rule 28A(5)(a). No specific reference appears to be made to the interests of justice test. As the Panel's decision is now final the application to set aside would appear to be an eligible decision which falls within the scope of rule 28A.
15. I have carefully considered the application to set aside and all the documentation before me. It is concerning that both the Applicant and the Respondent appear to misunderstand the nature of the test which I have to apply and the purpose and proper content of their representations.
16. The Applicant seeks to argue that the oral hearing was conducted "*unfairly and therefore unsafe*" and would "**therefore** [My emphasis] *ask the decision is set aside*". That is not the test. The Applicant also seeks to introduce further evidence and, through his solicitors, to make further submissions in support of his application for release.
17. The representations of the Respondent are made in an unhelpful format and also seek to introduce further evidence. I have placed no reliance on these.
18. The errors of fact relied on by the Applicant appear to be as follows (adopting the numbering in the application):
  - a) **1.1** The DL refers to reports in the dossier that the Applicant's conduct included forcing entry into the victim's home and assaulting her. The Applicant denies that he forced entry into the victim's home stating that he had a key to the house as they lived together.

The Panel noted his evidence on this point (DL 1.6) but understandably did not find it necessary to make a specific finding on this issue since the Trial Judge, who heard the case together with the jury, had found that the Applicant's conduct included forcing entry into the victim's home (dossier p.154) and, overall, the index offences were of a serious sexual nature committed over a prolonged period of time against a vulnerable individual. I find no error of fact here.

- b) **1.3** I take the same view in relation to the Applicant's denial that he infected the victim with a sexually transmitted disease. The Panel notes his denial (DL 1.6) but clearly places reliance on the Trial Judge's finding that the victim contracted "*sexually transmitted diseases, which in my judgment are overwhelming likely to have been given to her by you.*"
  - c) **1.5** Here the Applicant simply makes further submissions in relation to professional views and judgments which the Panel, in carrying out its task, will have set alongside the evidence of the Prison Offender Manager (POM) and the Applicant's own oral evidence. I can find no error of fact.

- d) **2.10** I find that, whether or not the Applicant stated that SS "*was too old to bear more children because she was 42*", in no way constitutes an error of fact but for which the decision not to direct release would not have been made.

The Applicant then goes on to make further submissions relating to SS and his relationship with her. The Panel found his assertions regarding his relationship status with her to be entirely implausible and that he purposely deceived the Probation Service for a period of nine months.

In closing submissions and in the application, the Applicant now accepts that he was in a relationship with SS but seeks to argue that this did not place him in breach of the licence condition to notify his supervising officer of any developing relationships with women because he only had to disclose a developing relationship and not an intimate one. Given the nature of his convictions and the obvious rationale for this condition, I find this to be a bizarre and unsustainable contention which requires no further comment from me.

- e) **2.13** The Applicant simply reiterates his oral evidence and seeks to put forward further matters in relation to an issue on which the Panel has made a clear finding of its implausibility based upon the evidence available to it at the hearing.
- f) **2.18** This is a matter upon which the Applicant, it seems, gave oral evidence to the Panel. Even if the Panel has in some way misunderstood his evidence, I do not find this to be a fact but for which a decision not to direct release would not have been made.
- g) **3.8** The Applicant seeks to challenge the Panel's identification of his risk factors which it is suggested are "*misleading*" and then purports to make further submissions in support. The Panel had the benefit of written and oral evidence and closing submissions in writing from solicitors on behalf of the Applicant. Their assessment of his risk factors is the result of their consideration of this material and the Panel's collective judgement. I can find no error of fact.
- h) **4.5** The Panel has made a clear finding with which the Applicant disagrees. Even if he is correct, I do not find that this is a fact but for which the decision not to direct release would not have been made. The Applicant then goes on to pray in aid his own mistake in evidence which adds nothing to this submission.
- i) **4.6** The Applicant wishes me to "*note*" something of which the Panel was obviously aware. I can find no error of fact here.

Thereafter, further submissions are made in support of the Applicant's arguments for release. No further errors of fact appear to be relied on.

## Decision

19. I have carefully considered the application to set aside and the matters relied on by the Applicant who is clearly unhappy that he is not being directed for release despite professional support for this.

20. For the reasons I have given I find that this is an application entirely without merit and I am satisfied that the Applicant is unable to demonstrate that the Panel fell into error as to fact and the application to set aside is refused.

**Peter H. F. Jones**  
**13 July 2023**