

[2023] PBSA 27

## Consideration of Set Aside in the case of Grant

### Application

1. The set aside process was initiated by the Parole Board Chair under rule 28A(1)(b) of the Parole Board Rules 2019 (as amended) on 28 April 2023. It falls to me to decide whether to set aside the decision made by an oral hearing panel (the **Panel**) dated 9 December 2022 to direct the release of Grant (the **Prisoner**). This is an eligible decision.
2. I have considered the application on the papers. These are the dossier, the oral hearing decision, three stakeholder response forms (**SHRFs**) dated 23 February 2023, 3 April 2023, and 21 April 2023 and an Executive Summary of a Multi-Agency Public Protection Arrangements (**MAPPA**) meeting dated 21 March 2023.

### Background

3. On 29 November 2019, the prisoner received a determinate sentence of 58 months' imprisonment (in total) following conviction for robbery, dangerous driving, driving a motor vehicle with excess alcohol, using a vehicle while uninsured, driving otherwise than in accordance with a licence, failing to stop when required and possession of a knife in a public place. His sentence end date is May 2024.
4. The Prisoner was aged 42 at the time of sentencing. He is now 45 years old.
5. The Prisoner was automatically released on licence on 24 December 2021. His licence was revoked on 28 January 2022, and he was returned to custody on 31 January 2022. This is his first recall on this sentence and his first parole review since recall.

### Current Parole Review

6. The Prisoner's case was referred to the Parole Board by the Secretary of State to consider whether to direct his release.
7. An oral hearing took place on 8 December 2022 before a three-member panel, including a specialist psychologist member. Oral evidence was taken from the Prisoner, his Prisoner Offender Manager (**POM**), his Community Offender Manager (**COM**) and a HMPPS psychologist. It is recorded that the Prisoner told the panel on the day that he had decided not to continue with legal representation. He was advised that the hearing could be adjourned at any stage should he change his mind. The hearing was completed on the day.



8. The panel directed the Prisoner's release.
9. In doing so, it noted that the Prisoner would be required to live for a minimum of six months in a specifically designed, contained environment where staff receive ongoing training to develop an increased psychological understanding of their work and of more complex behaviours (the **specialist accommodation**).
10. Release was explicitly directed "*on a date to be set by the Secretary of State which is likely to be based on the final availability date of [the Prisoner's specialist accommodation] bed when confirmed*".
11. The Parole Board received a SHRF dated 23 February 2023 (**SHRF 1**) from the Public Protection Casework Section (**PPCS**). This noted that the Prisoner's provisional acceptance at the specialist accommodation had been rescinded and that alternative designated accommodation without the benefit of staff being psychologically informed (the **mainstream accommodation**) was being sought. The application sought an amendment to the Prisoner's release licence so that he could be released to mainstream accommodation.
12. The Parole Board's standard procedure when licence variation requests are made after release is to refer the matter to a duty member. In response to SHRF 1, the duty member noted their concern about the significant changes to the proposed risk management plan, in particular:
  - a) the panel had understood that release would be to specialist accommodation for a minimum of six months;
  - b) the Prisoner had previously been released expecting to go to specialist accommodation (about which he was pleased, recognising his own support needs) but was instead released to hotel accommodation where he struggled to cope; and
  - c) no reason was given as to why the provisional acceptance at the specialist accommodation had been rescinded.
13. The duty member made no variation to the Prisoner's licence. In doing so, they concluded that it was a matter for the Probation Service to secure the placement at the specialist accommodation which was expected by the panel in directing the Prisoner's release.
14. On 3 April 2023, a further SHRF was received from PPCS (**SHRF 2**). This noted as follows:
  - a) the specialist accommodation had been approached again, but were still unable to offer the Prisoner a bed space as they did not think service provision in the area would be enough to help the Prisoner;
  - b) if the Prisoner's mental health deteriorated, he would not be given priority by the Community Mental Health Team (**CMHT**) as he would be "*out of county*" and the CMHT would be focussing on local people from the area;
  - c) local provision of other services would provide a "*wraparound service*" and hence offer better support than the specialist accommodation could; and

d) the Prisoner has been offered a bed space in mainstream accommodation for 12 weeks.

15. As with SHRF 1, SHRF 2 sought a variation to the Prisoner's licence so that he could be released to mainstream accommodation.

16. The matter was referred to the same duty member that considered SHRF 1.

17. The duty member noted as follows:

- a) the time proposed in the mainstream accommodation was now 12 weeks (as opposed to the six months in specialist accommodation envisaged by the panel);
- b) there was a lack of clarity around what exactly the "wraparound service" referred to in SHRF 2 would comprise.

18. The duty member made no variation to the Prisoner's licence. In doing so they noted (correctly) that it was a matter for the Parole Board to decide whether any proposed changes to community risk-management provision were such that it could confidently say that the public protection test for release remained met.

19. The duty member concluded by noting that any further SHRF must provide:

- a) reasons why the panel was told that the specialist accommodation would be available for six months when it now appears not to be viable and/or sensible;
- b) full details of the "wraparound support" that would be in place if the Prisoner was to be released to mainstream accommodation;
- c) assurance that a six-month placement would be available at the mainstream accommodation;
- d) the Prisoner's views on the proposed changes (noting that he was not legally represented at the hearing);
- e) a summary of the MAPPA minutes linked to the revised risk management plan.

20. A third SHRF was received from PPCS on 21 April 2023 (**SHRF 3**) responding to the five points set out by the duty member in their response to SHRF 2 (as summarised above).

21. In short, the responses were:

- a) the referral to specialist accommodation was not confirmed at the point of the oral hearing (and the COM apologised for any misinterpretation or miscommunication);
- b) support would be available from the community offender personality disorder (**OPD**) pathway for six sessions, augmented by various charity/third party agencies;
- c) a four-month placement at mainstream accommodation was guaranteed, and management would be "working towards five";

- d) the Prisoner is reported to have been angry, hostile and “*extremely aggressive*” and was unhappy at the prospect of release to mainstream accommodation;
- e) the MAPPA summary was not yet available.

22.The request for the licence variation was repeated.

23.SHRF 3 was referred to the same duty member as the preceding two SHRFs.

24.At this point, the duty member’s concerns were such that they referred the matter to the Chair of the Parole Board who, having read the papers, was content for the set aside process to be initiated.

25.For completeness, I have now seen the MAPPA meeting executive summary which was sought in the response to SHRF 2. This meeting concluded that the Prisoner remained a high risk of serious harm. At the time of the meeting (2 March 2023) the matter of the re-referral to specialist accommodation had not been completed.

### **The Relevant Law**

26.Rule 28A(1)(a) of 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.

27.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)).

28.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 parties**

29.Neither party has offered representations in response to this application.

## Discussion

30. The first question that must be answered is whether there is new information that was not available to the panel when the direction for release was given.
31. It is clear that there is. The discussion at the oral hearing was predicated on the availability of specialist accommodation for six months (or at least the impression, however incorrect, that such availability would not be problematic). New information clearly shows that there is no prospect of the Prisoner being released to specialist accommodation.
32. The next question is whether the panel would not have given a direction for release if that information had been available to it.
33. I find that to be so. The panel's decision was founded on a risk management plan which involved a six month stay at specialist accommodation, rather than the considerably more diluted plan currently proposed. Moreover, release to mainstream accommodation could be setting the Prisoner up to fail, given his previous difficulties when not released to the specialist accommodation he expected (and his documented negative response to being informed of the proposed new arrangements).
34. Finally, I must consider whether setting aside the panel's decision is in the interests of justice. I find that it is. The interests of justice would not be served in releasing a high-risk prisoner to accommodation that had not been contemplated by the releasing panel, and for a shorter period.
35. I therefore conclude that all elements required for the decision to be set aside are made out.

## Decision

36. For the reasons I have given, the application is granted, and direct that the decision of the panel dated 9 December 2022 is set aside.
37. I must now consider two matters under rule 28A(8). First, whether the case should be decided by the previous panel or a new panel and second, whether it should be decided on the papers or at an oral hearing.
38. The previous panel has the great benefit of having prepared the case, carefully considering the evidence before it at the time, reaching and documenting its decision. It is best placed to consider the case again, and I direct that it does so.
39. I have also considered whether an oral hearing is necessary considering the principles in **Osborn v Parole Board [2013] UKSC 61**. In fairness to the Prisoner, I direct the matter to a fresh hearing.

**Stefan Fafinski**  
**19 May 2023**