

[2024] PBSA 33

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

1. This is an application by the Secretary of State for Justice (the Applicant) to set aside the decision to direct the release of Leslie (the Respondent). The decision was made by a panel following an oral hearing. This is an eligible decision.
2. I have considered the application on the papers. These are the dossier (376 pages), the decision (dated 18 February 2024), and the application for set aside (dated 20 May 2024).

Background

3. On 3 March 2011, the Respondent received a sentence of imprisonment for public protection following conviction on nine counts of sexual activity with a male child under 16 (no penetration), six counts of sexual activity with a male child under 16 (with penetration), four counts of breach of a sexual offences prevention order, ten counts of making indecent photographs of children, ten counts of possessing indecent photographs of children, two counts of causing or inciting a male child under 16 to engage in sexual activity (no penetration) and engaging in sexual activity in the presence of a child under 16. Three further offences were taken into consideration: breach of sexual offences prevention order, engaging in sexual activity in the presence of a child aged 13–15 and causing or inciting a female child aged 13–15 to engage in sexual activity (no penetration). He pleaded guilty to all charges.
4. The minimum term was set at six and a half years, less time spent on remand, and expired in November 2015.
5. The Respondent was aged 27 at the time of sentencing. He is now 40 years old.
6. The Respondent was released on licence on 4 October 2021 following an oral hearing. His licence was revoked on 6 April 2023, and he was returned to custody on 11 April 2023. This is his first recall on this sentence and his first parole review since recall.

Application for Set Aside

7. The application for set aside has been drafted and submitted by the Public Protection Casework Section (**PPCS**) acting on behalf of the Applicant.



8. The application for set aside submits there is further information constituting a significant change in circumstances 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.
9. The content of the application will be considered in the **Discussion** section below.

Current Parole Review

10. 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.
11. The case proceeded to an oral hearing on 6 February 2024 before a two-member panel. The Respondent was legally represented throughout the hearing. The Applicant was not legally represented. The panel heard oral evidence from the Respondent, his Prison Offender Manager (**POM**) and his Community Offender Manager (**COM**). The POM and COM both supported the Respondent's release. The panel directed the Respondent's release.

The Relevant Law

12. Rule 28A(1)(a) of the Parole Board Rules 2019 (as amended) 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.
13. 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)).
14. 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

15. The Respondent has submitted a statement in response to the application which will be considered in the **Discussion** section below.

Discussion

16. On 2 May 2024, the Applicant was notified by the POM that, on 29 April 2024, another prisoner had made an allegation of sexual assault against the Respondent to prison staff. The Applicant then asked the COM to provide further details of the incident, an update on the police referral, and a view on safeguarding and impact on the risk management plan.
17. The incident is said to have taken place on 28 April 2024. It is alleged that the complainant entered the Respondent's cell to borrow some vape caps and the Respondent asked to see the complainant's genitals by way of 'payment'. The complainant acquiesced to this request. It was then claimed that the Respondent touched the complainant's genitals. Staff became aware when the complainant later self-harmed, citing distress over the alleged incident.
18. The complainant is reported to be 20 years old, with diagnoses of autistic spectrum disorder, emotionally unstable personality disorder and disorganised attachment disorder. The complainant is also reported to be transgender, prone to emotional outbursts and frequently resorting to self-harm. In the community, the complainant is reported to be subject to deprivation of liberty safeguards and has 24-hour 2:1 staffing.
19. The incident was reportedly referred to the police.
20. The COM is concerned that, if the allegations are true or partially true, the Respondent has exploited the vulnerability and instability of a younger male (with arguably compromised ability to give consent) for sexual gratification. It is argued that the complainant's circumstances were, or ought to have been, apparent to the Respondent, rendering his alleged actions reckless. It is argued that the Respondent prioritises his sexual urges over all considerations. The COM notes that, if he replicated the alleged behaviour in the community, he would be likely to attract similar allegations, if not charges and convictions for further sexual offences.
21. It is further submitted that the incident also sheds doubt on the Respondent's level of openness and honesty regarding relationships.
22. Legal representations on behalf of the Respondent note that the COM provided no information to the Applicant's request concerning the status of police involvement. It is also noted that the complainant lacks capacity and has significant mental health issues. The Respondent denies the allegations.
23. The Respondent sets out passages from two High Court authorities in support of his position.
24. First, *Broadbent v Parole Board of England and Wales* [2005] EWHC 1207 (Admin), in which Stanley Burnton J notes (at [27]):

"...the fact of a charge and a pending prosecution alone cannot without more justify a conclusion that there is a risk of reoffending. If it were, the Parole Board would be delegating to the prosecution authority the assessment of

the conduct of a prisoner and the evidence or facts said to give rise to a risk of reoffending. Moreover, if the fact of a charge and a prosecution for the offence was sufficient, it is difficult to see how the Board could give to the prisoner the fair hearing to which he is entitled, as envisaged by the House of Lords in R (Smith and West) v Parole Board [2005] UKHL 1"

25. Second, *R(McHale) v Secretary of State for Justice* [2010] EWHC 3657 (Admin), in which Langstaff J notes (at [16]):

"It would seem to me to be offensive that a prisoner should be assumed to have committed an offence merely because he had been charged with it; the charge in itself is something of which he must be presumed innocent unless and until proved guilty."

26. The Respondent notes that both *Broadbent* and *McHale* are distinguishable from the present case as they both refer to allegations which have been charged but not yet tried. Without more, it might appear that acknowledging the distinguishability of two cases on which the Respondent is seeking to rely is potentially a self-defeating acknowledgement.

27. However, my interpretation of the Respondent's position, having put forth the passages from *Broadbent* and *McHale* is this: if a charge cannot justify a conclusion that there is a risk of reoffending, then neither can a mere allegation (since a mere allegation without charge is even less compelling evidence of risk-related conduct).

28. Although not advanced by the Respondent, I note that in *McHale*, Langstaff J goes on to say (still at [16]):

"But I have to remember that the context here is not one of proof of guilt; the context is that of assessing risk to the public. Risk must be assessed on all the available relevant information. Whereas I agree, as I have said, that the fact of a charge does not without more justify any alteration to an assessed risk of reconviction, it is often not a big step from the fact of the charge to understanding something of the alleged facts said to give rise to the charge, from which the behaviour of the relevant defendant may be derived."

29. The Parole Board is, of course, concerned with risk, not guilt, and (following *McHale*) risk must be assessed on all the relevant information.

30. In the present case, the allegations are unsubstantiated. They have not proceeded to a charge. There is no evidence that the police have interviewed the Respondent or the complainant, that any file has been sent to the Crown Prosecution Service (**CPS**), let alone that the CPS has concluded that there is enough evidence against the Respondent to provide a realistic prospect of conviction. There is certainly no indication that a charging decision has been made.

31. I also note that the Applicant states that the Respondent was moved to the Care and Separation Unit under rule 53 after the complaint had been made. Rule 53(1) of the Prison Rules 1999 provides that where a prisoner is to be charged with an offence

against discipline, the charge must usually be laid within 48 hours of the discovery of the offence. There is therefore also no evidence that the Respondent has been adjudicated in respect of the allegation, and, since three weeks has passed between the alleged incident and the application for set aside being made, any possible adjudication would most likely have time-expired by now.

32. On the evidence before me, I am not satisfied that the Respondent has established that there has been an increase in risk. The allegation set out in the application is (at the present time) unsubstantiated, unadjudicated and uncharged. There is no corroborating evidence. The Respondent denies the allegations. The Applicant cannot therefore fairly conclude on the evidence available that the Respondent is prioritising his sexual urges and/or knowingly or recklessly taking sexual advantage of a vulnerable male.

33. In conclusion, there is insufficient evidence of increased risk for me to find that the panel would have made a different decision had it known of the currently available information relating to the allegation.

Decision

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

Stefan Fafinski
04 June 2024