

# R (on the application of Pearce and another) (Respondents) v Parole Board for England and Wales (Appellant)

Date: 5 April 2023

## Justices

Lord Hodge (Deputy President), Lord Kitchin, Lord Hamblen, Lord Richards, Lord Hughes

## Background to the Appeal

The Parole Board for England and Wales ("the **Board**") is responsible for deciding whether or not to direct the early release of prisoners serving various categories of sentences of imprisonment. When making its decision, the Board must be satisfied that it is no longer necessary for the protection of the public that the prisoner should remain in custody. One example of that test is to be found in section 28(6)(b) of the Crime (Sentences) Act 1997 ("the **Statutory Question**").

In March 2019, the Board issued its "Guidance on Allegations" ("the **Guidance**") concerning the correct approach to take, when answering the Statutory Question, with respect to allegations made about the prisoner beyond offences of which they were convicted. Sometimes such allegations have not been proved or disproved on the balance of probabilities but, if true, could affect the Board's risk analysis. The Guidance directed the Board to "make an assessment of the allegation to decide whether and how to take it into account". The Guidance further provided that "in cases where there is a mere allegation without any factual basis... or the allegation is not relevant to the question of risk... [it] should be disregarded."

On 13 October 2010, Mr Pearce was sentenced to imprisonment for public protection with a minimum term of three and a half years (less time spent on remand) following conviction for sexual assaults. On its most recent review of his imprisonment in May 2019, the Board refused to direct Mr Pearce's release ("the **Decision**"). In accordance with the Guidance, when addressing the Statutory Question the Board took into account a number of allegations of other sexual assaults and Mr Pearce's responses when questioned about them.

Mr Pearce challenged the Decision and the Guidance by way of judicial review, arguing that, in the absence of findings of fact, an allegation is simply a "non-fact" and, as such, it is not permissible for the Board to pay any attention to it at all. The High Court dismissed Mr Pearce's claim. On appeal, the Court of Appeal held that the parts of the Guidance which countenanced the carrying out of a risk assessment by reference to allegations which had not been proved were unlawful. However, the Decision itself was held to have been proper and justified on the facts.

The Board appealed to the Supreme Court, arguing that the Court of Appeal was wrong to hold that parts of the Guidance were unlawful.

## Judgment

The Supreme Court unanimously allows the appeal, but nevertheless invites the Board to review the terms of the Guidance. Lord Hodge and Lord Hughes give the judgment, with which Lord Kitchin, Lord Hamblen and Lord Richards agree.

## Reasons for the Judgment

The Supreme Court notes that the question raised by this appeal is one of statutory interpretation. The Board's statutory remit is that it may not release a prisoner unless it is satisfied that it is no longer necessary for the protection of the public that they remain in custody. The central question is whether there

is anything in the legal context of the Board's role which limits it to only taking into account proven facts of past behaviour, while excluding from consideration in any circumstance the possibility that any unproven allegations made against the prisoner might be true [14]; [29]; [72]-[73].

The Supreme Court holds that there is no such limitation. There is therefore no requirement to be implied in the statutory test that the Board must disregard the possibility that an unproven allegation may be true [73].

Firstly, the Supreme Court rejects the suggestion that the law knows only a binary approach of fact or non-fact [30]-[65]. As a general rule in civil proceedings, only "facts in issue" (those facts which it is necessary to prove in order to establish a claim or defence) must be established on the balance of probabilities [32]-[34]; [38]. Not every fact is a fact in issue. Facts which are part of the material from which a fact in issue may be inferred do not need to be proved individually [34]. Evidence which is not sufficient to establish a fact on the balance of probabilities may still be relevant when the judicial body assesses the weight of other evidence in deciding whether a fact in issue is established [35]-[38].

It is well settled law that if a care order is sought under section 31(2) of the Children Act 1989 based on an allegation that a previous child was harmed in a specific way by one or both of the parents, that allegation must be proved on the balance of probabilities. However, that rule is specific to the care order regime. It is mandated by the different language of the Children Act, and even in that context there is at least one situation in which an unproven possibility that a parent has harmed a child can be taken into account. The question whether the State is entitled to remove a child from home and family is not analogous to the question whether a prisoner who remains subject to a sentence can safely be released [47]-[64].

The Supreme Court holds that, similarly, risk may be assessed without the judicial body being able to find proven every foundation fact [34]-[46]. Depending upon the legal context, the judicial body can assess risk by weighing up the possibility that an allegation may be true having regard to the whole material before it [39]-[42]; [44]-[46]; [60]-[62].

Secondly, while the Board must comply with the requirements of procedural fairness in the conduct of its proceedings and keep in mind the consequences to the prisoner of its decision, the Supreme Court finds no basis for the contention that fairness requires the Board to have regard only to proven facts in making its assessment [66]-[67]; [69]-[71]. Substantive fairness does not require a judicial body to treat as if they were facts in issue information which, on a proper analysis, is not of that nature [68].

The Supreme Court invites the Board to review the Guidance in light of its judgment, to make clear that the Board should, if it reasonably can, make relevant findings of fact [74]; [89]. If an allegation could, if true, affect the Board's risk assessment, the Board's task, so far as it can, is to explore the nature of that allegation and its surrounding circumstances in order to make findings of fact where it is reasonably practicable to do so [74].

Where the Board is not in a position to make findings of fact, either because there is insufficient material available, or it would not be fair to do so (because, for example, the prisoner may properly decline to respond to an allegation which is the subject of a pending criminal investigation or prosecution), but is concerned that there is a serious possibility that an allegation may be true, the Board may still take that allegation into account and give it such weight as it considers appropriate in a holistic assessment of all the information before it [76]-[77]; [87]; [90]. In those circumstances, procedural fairness would require the Board to give the prisoner the opportunity to state their position in relation to the allegation and to argue that no or very little account should be taken of it [66]-[67]; [70]; [87]; [90]. An oral hearing may also be required if the allegation is likely to be material to the risk assessment or if issues of explanation or mitigation are likely to arise [75]. The Board's assessment of the weight to be attached to an allegation is subject to the constraints of public law rationality [87]; [93].

The Board may also be persuaded that it is not safe to release the prisoner based on the surrounding facts: in some cases, the number and nature of allegations from independent sources might justify the Board in concluding that the prisoner has engaged in a course of conduct giving rise to a risk to the public even if no single one of the allegations is found proven. In other cases, a holistic assessment of all the circumstances

may persuade the Board that there is a significant chance, short of the balance of probability, that an allegation is true [79]; [83]. Further, where the Board cannot make a finding as to the truth of an allegation, the allegation can also be used to test the credibility of the prisoner's account of their behaviour [78].

The Supreme Court notes that there may be circumstances where, because of the inadequacy of the information, the Board concludes that it should not take account of an allegation at all [87].

Finally, the Supreme Court finds that the concept of a "mere allegation" (and the contrast made in the Guidance between that and an allegation for which there is "some factual basis") is unhelpful. This shifts the focus away from assessing the quality of the evidence of the circumstances surrounding the allegation [93].

*References in square brackets are to paragraphs in the judgment*

## **Note**

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available online. [Decided cases](#)