

[2023] PBSA 6

## Application for Set Aside by the Secretary of State for Justice in the case of Tulley

### Application

1. This is an application by the Secretary of State for Justice (the Applicant) to set aside the decision made by an oral hearing panel dated 21 December 2022 to direct the release of Tulley (the Respondent).
2. I have considered the application on the papers. These are the oral hearing decision, the dossier, and the application for set aside (18 January 2023).

### Background

3. The Respondent received a determinate sentence of three years in custody on 20 May 2020 following conviction on three counts of breach of a sexual harm order to which he pleaded guilty.
4. The Respondent was aged 24 at the time of sentencing. He is now 26 years old.
5. The Respondent was automatically released on licence on 8 November 2021. His licence was revoked just over two months later on 14 January 2022, and he was returned to custody on the following day.

### Application for Set Aside

6. The application for set aside has been drafted and submitted by the Public Protection Casework Section (PPCS) acting on behalf of the Applicant.
7. The application for set aside submits further information which, it is argued, constitutes a significant change in circumstances which impacts the risk management plan, and which came to light after the panel made its decision.

### Current Parole Review

8. The Respondent's case was referred to the Parole Board by the Applicant to consider whether to direct his release.
9. The case proceeded to an oral hearing on 13 December 2022 before a single-member panel. The Respondent was legally represented throughout the hearing. Oral evidence was given by the Respondent's Prisoner Offender Manager (POM) and



his Community Offender Manager (COM). The panel directed the Respondent's release.

## The Relevant Law

10. 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.
11. The types of decisions eligible for set aside are set out in rules 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)).
12. 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 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. Submissions drafted by the Respondent's legal representative set out the Respondent's position. These note that the allegation and explanation behind it are not disputed. It is submitted that since the Respondent's sentence ends in May 2023, it would be preferable to manage his risk in the community on licence rather than release him at the end of his sentence without support. It is further submitted that the Respondent has made no effort to hide what has happened, has taken full responsibility, and has shown insight.

## Discussion

### *Eligibility*

14. The application concerns a panel's decision to direct release following an oral hearing under rule 25(1)(a). The application was made prior to the Respondent being released and argues that the condition in rule 28A(4)(b)(i) is made out. It is therefore an eligible decision which falls within the scope of rule 28A.

### *New information*

15. The application notes that security information has been received which suggested that the Respondent had made a call to a cancer support helpline posing as an 11- or 12-year-old girl concerned about a full body examination due to possible vaginal cancer. The Respondent also (within the same call) posed as the fictional child's father who said that he had told 'her' that she would need to stand naked in front of a doctor.
16. The Respondent did not disclose any matters of concern or difficulty to staff until confronted with the new information by his COM.

### *The test for set aside*

17. In determining the application for set aside, I must consider whether the events described above would have affected the panel's decision to direct the Respondent's release.
18. The Respondent does not dispute the allegations.
19. I am satisfied that the Respondent's actions are evidence of heightened sexual preoccupation and a disinclination to be open and honest with staff when experiencing difficult feelings.
20. I must go on to consider whether the direction for release would not have been given if the new information had been before the panel.
21. I am satisfied that is the case. It is difficult to see a situation in which a panel would direct the release of a prisoner who was evidencing active risk factors involving a sexual preoccupation with female children whilst in custody and not proactively seeking help from professionals, particularly since he had said he recognised the importance of openness and honesty.
22. Having decided that the panel's decision to direct release would have been affected, I must finally consider whether it is in the interests of justice for its decision to be set aside.
23. I am satisfied that it is in the interests of justice for the panel's decision to be set aside. The interests of justice would not be served if the release of a prisoner with an established history of sexual offending against children took place in the knowledge that this remained, in fact, a live issue within the custodial setting and that he was acting out pre-teen gynaecological fantasies (as well as abusing the service provided by a charity cancer support helpline).
24. The argument that it would be preferable for the Respondent to be released on licence rather than unsupervised at the end of his sentence is without merit. Following **R (King) v Parole Board [2016] EWCA Civ 51** (and as noted in **R (Secretary of State for Justice) v Parole Board [2022] EWHC 1282 (Admin)**) the application of the release test does not entail a balancing exercise in which the

risk to the public is to be weighed against the benefits of release to the prisoner or the public.

## Decision

25. For the reasons I have given, the application is granted, and the final decision of the panel dated 21 December 2022 should be set aside.
26. 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.
27. The previous panel has the great benefit of having prepared and heard 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.
28. I have also considered whether an oral hearing is necessary considering the principles in **Osborn v Parole Board [2013] UKSC 61**. The matters which are pending adjudication have been accepted by the Respondent and are clearly set out in the application. The Respondent has had the opportunity to state his position in relation to those matters. In all the circumstances, I consider the current panel would have sufficient information to decide the case on the papers and make directions accordingly.

## Directions

29. The following directions are now made:
- (a) The paper review should take place at the earliest possible opportunity subject to availability of panel members and the completion of the directions below.
  - (b) It should be undertaken by the same panel that convened on 13 December 2022.
  - (c) The panel should be told that its previous decision has been set aside but not made aware of the reasons why it was set aside.
  - (d) The panel should be advised that this is a complete re-hearing.
  - (e) The updated information must be added to the dossier.
  - (f) The Respondent's legal representative is invited to make any further representations directly to the panel by 1 February 2023.

**Stefan Fafinski**  
**27 January 2023**