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[2023] PBSA 8

Application for Set Aside by Harrison

Application

1. This is an application by Harrison ("the Applicant") under rule 28A(1) of the Parole Board Rules 2019 to set aside a decision of the Parole Board dated 10 December 2022 declining to release him. The decision followed an oral hearing which commenced on 7 September 2022 and was completed on 15 November 2022.

2. Rules 28A(3) and (4) of the Parole Board Rules, so far as relevant to this application, provide that a decision maker appointed by the Parole Board may set aside an eligible final decision (as set out in rule 28A(1)) if the decision maker is satisfied that the decision would not have been made but for an error of law or fact and that it is in the interests of justice to set aside the decision.

3. I have considered the application on the papers. These are: (1) the dossier, now running to some 766 pages including the decision letter; (2) the application to set the decision aside dated 29 December 2022; and (3) a summary of the grounds of the application undated but received on 13 January 2022. In addition I have listened to significant parts of the recordings of the hearings – namely, the police evidence given on 10 December 2022, the evidence given by the Applicant on both dates, and submissions made on behalf of the Applicant on 7 September 2022.

Background

4. On 17 June 2013 the Applicant, then aged 31, was sentenced to determinate terms of imprisonment amounting in total to 10 years 4 months. On 6 April 2018 he was released automatically on licence at the half-way point in his sentence. [Redacted]. He was placed in approved premises ("the AP") in an area a considerable distance away from his family and associates. On 10 September 2018 his licence was revoked; he was returned to custody the following day. Unless released by the Parole Board he will remain in custody until the expiry of his sentence on 8 June 2023.

5. The Applicant's sentences were imposed for sexual offences against three boys between the ages of 10 and 15 and for offences of taking and possessing indecent images of children. The Judge described him as a predatory paedophile. Two of the boys he met on the street; one was the son of a family friend. The offences against one boy aged about 13 lasted about 6 months and involved [redacted]. The offences against another started when that boy was aged 10, lasted for a period of some 4 years and involved [redacted]. The offences against the third were short-lived and less serious. The offences relating to indecent images included the taking of

photographs of his victims as well as a large collection of other images of other boys engaged in sexual activity.

6. The Applicant had two previous convictions for indecent assaults on males under 14 committed in 1997 when he was himself 16 years of age.

7. The Applicant's recall to prison in September 2018 followed allegations made by a 17-year-old youth ("the complainant") with whom he had allegedly been in contact over the internet from the AP. The Applicant was not convicted of any further offence arising out of those allegations. As will appear below, the circumstances of the recall, and the Applicant's account of and attitude to it, were important factors in the decision of the present panel.

The Grounds of the Application

8. The application dated 29 December was submitted *"on the basis that the decision is wholly irrational on the evidence given, and that the panel have made several errors of fact when reaching their decision".* It was developed over some 14 pages and 53 paragraphs. I asked the Applicant's legal representative for a summary of the precise errors of fact alleged; this was provided in a helpful 3-page summary on 13 January. I have taken account of the full application as well as the 3-page summary in considering whether there is anything which calls for the decision to be set aside.

9. The application also criticises the decision for failing to give adequate reasons for departing from the professional opinion of witnesses given at the hearing. I have considered whether this criticism is made out, for (as I will explain below) it may amount to an error of law.

10. In these reasons I think it will be more helpful if I first set out the principal issues which arose at the oral hearing and summarise the panel's conclusions before returning to the detail of the application.

Current parole review

11. Following his recall the Applicant undertook further core risk reduction work – the Healthy Sex Programme ("HSP"). His custodial conduct was good; he was adjudication-free and held enhanced status. His release was recommended by successive Community Offender Managers ("COMs") in reports dated July 2021, December 2021 and July 2022. It was also recommended in a psychological risk assessment by a prison psychologist dated 21 June 2022.

12. In his dealings with professionals as they prepared their reports for the oral hearing the Applicant does not appear to have challenged to any significant extent the circumstances of his recall. Thus the prison psychologist stated in June 2022 that he *"accepts full responsibility for the index offending and the circumstances leading to his recall in 2018".* And the COM, in July 2022, when discussing the Applicant's attitude to recall, noted that he had reflected on his use of dating apps and intended to focus on family support and building community integration.

13. However, the circumstances of recall and his attitude to it were to play a greater part in the hearing. Police documents relating to the matter were included in the dossier. At the oral hearing on 7 September 2022 evidence was taken from professional witnesses and the Applicant. The panel wished to hear from police witnesses concerning the recall allegations and adjourned for the attendance of police witnesses. At the further hearing on 15 November 2022 the panel heard evidence from police witnesses and further evidence from the Applicant. I will summarise in the following paragraphs the main evidence the panel received concerning these allegations.

14. The principal allegations against the Applicant arose out of his contact with the complainant. The complainant had put a "Shout Out" on a social media platform Snapchat – effectively a request for new friends. He was contacted by a user called "Naughty Boy". This user engaged in messaging with him: a lengthy extract from the messaging is in the dossier at pages 536 to 555; the user explicitly says that he likes boys aged 8 to 16, enquires about the complainant's younger brothers, is told that they are aged 16 and 14, asks for a picture of the 14 year old, suggests that the complainant initiate sexual activity with one of his younger brothers apparently with a view to photographing or filming it, and suggests that he may send the complainant images from Dropbox. The complainant told the police that he had received images of two naked children and a video of a boy giving oral sex.

15. The user name of the Snapchat ID "Naughty Boy" was identified by the police as S.HARRISON04 with a location at the approved premises where the Applicant was residing. The user had provided a photograph which was a photograph of the Applicant. The Applicant had already been the subject of a warning from a team manager concerning his use of social media and dating platforms. He was identified by the police as the user.

16. The Applicant was arrested on 9 September 2018. He provided the police with his telephone and the password to it. For the most part he answered no comment to questions in interview; but he said he had disclosed and had approval for a Snapchat account.

17. The phone was accessed and data extracted on 10 September 2018. The web history from 9 June to 6 September was visible on the phone but 4 search pages out of 1217 had been deleted. It was a requirement of the Applicant's Sexual Offences Prevention Order that he not delete the history at all, and a prosecution was initiated against him for it. However, there was nothing suspicious about the four pages deleted and the Applicant denied deliberately deleting anything. The case against him was dropped and the charge dismissed on 29 October 2018.

18. It also emerged from the examination of the telephone that there were two Snapchat accounts – one for which the Applicant had permission (SHarrison01), and one which he had not disclosed. And that he had received an email concerning the opening of a Dropbox account, consistent with the reference to Dropbox in the messaging.

19. Apart from the alleged breach of SOPO the Applicant was not charged with any offence arising out of the complaint made by the youth. An advice note from the Crown Prosecution Service ("CPS") was read to the panel summarising reasons why.

The reasons included an issue over disclosure, a concern about delay caused by the complainant, and other concerns about the complainant.

20. In his evidence to the panel the Applicant denied having any contact with the complainant. He said that the second Snapchat account and the username "Naughty Boy" must have been set up maliciously by others at the approved premises. He said that he had lent his telephone to others and allowed them free access to it against advice from the police public protection officer. It was pointed out to him that, since [redacted] and moved to a different part of the country, no-one would have known the nature of his offending. He said that someone may have looked at his file in the AP's office. He said that the photograph of him passed to the complainant must have come from his Grindr account; he accepted it was a mistake to have had that account, but said that he had not committed any offences on licence.

21. The panel did not accept the Applicant's evidence; they found him an unreliable witness and disbelieved his account. For the purposes of this decision, it is sufficient to quote several paragraphs from the panel's conclusions:

"4.3 The panel remained very concerned by [the Applicant's] behaviour whilst on licence. He utilised social media, but did not initially heed advice and guidance, and made poor decisions. The panel was concerned about his increase in sexual preoccupation that led to him making contact with young men online, and the subsequent allegations raised against him, both of which were discontinued due to technical issues or matters of jurisdiction. The panel noted that he maintains his innocence of these matters, and blames others for generating accounts and usernames on his phone, and sending messages, and the panel did not find this account to be credible. It remains the case that a 17-year-old male contacted police to disclose sexual abuse images allegedly sent to him by [the Applicant]. This led to recall. The panel's view is that [the Applicant] engaged in risky and sexualised behaviours.

4.3.1 Relatively quickly upon release, [the Applicant] demonstrated some paralleling behaviours to the index offending. He demonstrated an interest in seeking relationships, and in pursuing contact with young males on-line, and the messages indicate an interest in encouraging inappropriate behaviours. This concerns the panel as it appeared to be his focus. It indicates a level of sexual preoccupation, which the panel identifies as a core risk factor.

4.3.2 He has an established history of sexual offending against male children, and the allegations that led to recall were very similar in nature to the index offences for which he was convicted. He has previously admitted to an increasing sexual preoccupation, and not seeking help to manage it appropriately.

4.3.3 The panel accepts that [the Applicant] has subsequently completed HSP, but did not find him to be an open, honest, and credible witness; and is concerned that his deceptive behaviours will make it difficult for him to be robustly managed and supervised in the community, where there will be a heavy reliance upon external controls. Further work to address [the Applicant's] thoughts, feelings and beliefs about sex, intimacy and relationships, and his openness and honesty with professionals, is required.

4.3.4 The panel did not accept [the Applicant's] evidence that his phone had been tampered with by others, and preferred the views of professionals, and that charges were pursued but discontinued because of technical, administrative, and jurisdiction reasons. The panel is concerned about the nature and level of [the Applicant's] deception on licence and the implications of this for future risk management. It is not for the panel to determine how best to address outstanding treatment needs, or requirements to evidence motivation, engagement, and likely compliance through open and honest discussions, are met – that is a matter for the Secretary of State."

The relevant law

22. The decision not to release the Applicant was taken under rule 25(1)(b) of the Parole Board Rules 2019. Such a decision is a final decision and is eligible for the set aside procedure: see rule 28A(1) and (3) of the Rules. I have been appointed as decision maker for the purposes of this application.

23. An application under rule 28A(1) of the kind made by the Applicant must be brought within 21 days of the decision: see rule 28A(5)(a). That requirement has been satisfied in this case.

24. Rule 28A(3) provides that the decision maker may set such a decision aside if satisfied that (1) one of the conditions in rule 28A(4) is applicable and (2) it is in the interests of justice to do so.

25. The condition on which the Applicant relies is set out in rule 28A(4)(a) which provides

> *"(a)the decision maker is satisfied that a direction given by the Board for, or a decision made by it not to direct, the release of a prisoner would not have been given or made but for an error of law or fact."*

26. Two points should be made about what may amount to an error of law.

27. Firstly, a panel is required by law to give reasons for its decision. The reasons do not have to be drafted elaborately or at great length; they should identify in broad terms the factors relevant to risk of re-offending and serious harm, the considerations which led to the final decision and the panel's reasons for the conclusion it reached: see **Oyston** [2000] PLR 45. If the panel is differing from an expert its reasons should explain why; but the extent of the reasoning will depend on the issue. The panel's reasons should be read as a whole.

28. Secondly, a panel is required by law to reach a rational decision. The test for irrationality is whether the decision was *"so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".* See **CCSU v Minister for the Civil Service** [1985] AC 374, applied to Parole Board decisions by **R (DSD and others) v the Parole Board** [2018] EWCH 694 (Admin). This is the standard I have applied when assessing the argument that the decision taken was irrational. I have

considered that issue over and above the issue whether there were errors of fact as alleged.

The reply on behalf of the Secretary of State

29. The Secretary of State ("the Respondent") has indicated that no representations are to be made in respect of this application.

Discussion

Errors of fact

30. It is convenient to begin with the assertions of errors of fact which are made on the Applicant's behalf. I have considered both the summary and the more discursive account in the application.

31. Several criticisms centre upon paragraph 2.4 of the reasons, where the panel summarises some of the evidence relating to recall. I will quote this paragraph:

"In summary, [the Applicant] received warnings about his use of social media and dating applications while he was in the Approved Premises. He was recalled after concerns were raised about him seemingly distributing indecent images, and breach of SHPO by alleged deletion of his browsing history. The alleged breach was discontinued due to an administrator error, and the alleged distribution of indecent images was dismissed as no evidence was offered. It is reported that images shared by Snapchat are immediately deleted and that, as the account fell within the jurisdiction of the United States, and his SHPO conditions did not require him to share log in details, the records could not be accessed, and the prosecution could not proceed. The police noted that, without [the Applicant's] cooperation, and with other prioritised work, it took 12 months to access the phone."

32. I am satisfied that the last sentence of this paragraph contains a significant error of fact. As noted above, the Applicant did co-operate in giving the password to his phone and access was obtained to it almost immediately. It was the complainant – not the Applicant – who failed to co-operate in giving access to his phone and whose failure caused 12 months delay. This is clear from two passages in the recording of the 15 November hearing: the evidence of a police witness at 29:30 – 30:00 and the text of a CPS letter read to the panel by a police witness at approximately 42:00 to 44:38.

33. The two previous sentences of this paragraph are also criticised; and they are, on my reading of the evidence, not by any means a full account of the reasons for discontinuing the breach of SOPO or deciding not to proceed with charges relating to indecent images. As to the breach of SOPO, reasons given include an issue over disclosure (which may perhaps be described as technical or procedural) but there is also a contemporaneous report of the proceedings by the Applicant's solicitor which suggests more substantive reasons, such as inability to prove that the deletion of the four pages was deliberate. As to charges relating to indecent images, the reasons given by the CPS for not proceeding included an issue relating to disclosure (which again may perhaps be described as administrative or technical) but also concerns about delay and the complainant's role. It appears to me also that

the Applicant's legal representative is correct to submit that the police did have access to the Snapchat account and that the reference to an account within the jurisdiction of the United States should be to Dropbox (an account which does not seem to have been found on the Applicant's telephone, although there is an email reference to opening such an account).

34. Although the application puts forward other errors of fact, the criticisms are not in my view well founded.

35. (1) The panel is criticised for saying that the POM and the COM felt police evidence would be helpful in *"filling gaps"*. This is, however, not an accurate quotation. The panel, in summarising the procedural history, said the following about the reasons for adjourning the September hearing:

> *"Both the POM and COM indicated that hearing from the police would be helpful, as they were unable to confidently reach a view of [the Applicant's] manageability within the community."*

36. The criticism in the summary appears to differ from the application itself (paragraphs 16-18), where it appears to be accepted that the POM and the COM agreed with the panel that the evidence from the police would help to fill gaps. The point made in the application appears to be that all the experts agreed that their views were not changed by the police evidence – a point to which I will return later in these reasons.

37. (2) The panel is criticised for saying that the Applicant had responded poorly to supervision. The panel said that he had *"provided a poor response to supervision and trust in the community, having been recalled…".* The panel was referring to the period between April and September 2018, and its finding is plainly correct, for on his own admission the Applicant had disregarded advice about the use of social media and been warned for it. If the panel's subsequent findings about his contact with the complainant are correct, his response to supervision was minimal.

38. (3) The panel is criticised for citing the legal representative's argument incorrectly in adjournment directions and in its decision. I do not think this would amount to an error of fact, but I will deal with it in any event. The panel recorded the legal representative's argument at the September hearing as being that it was not relevant to consider the allegations concerning recall because they were from 4 years ago and had not been pursued to conviction. The legal representative disputes that this was ever part of her argument. However the legal representative made a point to this effect on 15 September 2022 (recording, part 2, 13.06) when opposing a suggestion by the panel that the matter should be adjourned for police evidence.

39. (4) The panel is criticised for saying that the POM and COM indicated doubts on manageability; the point is made that they did not resile from the opinions expressed in their earlier reports that risk was manageable. I do not see any error of fact here: the panel is entitled to note qualifications made by a professional witness even if they fall short of a change of opinion.

40. (5) The panel is criticised for stating that an AP bed was available on 5 December 2022. This was the original date given; but it was revised by the November hearing to 16 January 2023. I do not think this is an error of any significance.

41. (6) The panel is criticised for expressing doubts about the Applicant's support network and for noting that move-on accommodation was unclear. These are matters of assessment for a panel; the panel did not make any errors of fact on either of these subjects.

42. In summary, therefore, there is a significant error of fact in the last sentence of paragraph 2.4. While the balance of this paragraph does not contain any errors of the same significance, they give an incomplete and at one place inaccurate account of the position regarding the reasons why breach proceedings were discontinued and indecent images proceedings not brought.

Error of law

43. As noted above, the only potential error of law identified by the application is an assertion that the panel did not sufficiently give reasons for differing from the opinions of professional witnesses.

44. In my view, it is plain from the reasons of the panel read as a whole why the panel reached its conclusion. It investigated the circumstances of recall in a way which had not been undertaken by the POM, the COM or the psychologist. Having done so, it concluded that the Applicant had not given an honest and credible account; it therefore fundamentally differed from the assessment of the psychologist, as it explained in paragraph 3.4 of its reasons. It did not consider that the Applicant was open, honest or genuine and, given his history as a predatory paedophile, did not consider that he could safely be managed in the community. In my view the panel complied with its legal duty to give sufficient reasons for its decision.

Irrationality

45. Subject to my criticisms of paragraph 2.4, which I have set out above, I do not see anything irrational in the decision of the panel. There were powerful reasons for concluding that the Applicant had not been straightforward in his evidence and that he was the person communicating with the complainant over Snapchat. Once granted that this was the conclusion of the panel, it was not irrational to conclude that he was not being open and honest; and that his risk could not be safely managed in the community.

Effect of error on the decision

46. I must now consider whether the panel's decision not to release the Applicant would not have been made but for the errors of fact which I have identified. The principal error was that the Applicant failed to co-operate with the police, leading to 12 months' delay in accessing the phone. This error is potentially relevant to the panel's assessment of his honesty and to its findings of fact about the Applicant's contact with the complainant and about his manageability.

47. I have carefully borne in mind the nature of the panel's error and the generally positive tenor of the reports of the POM, COM and psychologist. I have listened for myself to the evidence of the police and the Applicant (who gave evidence twice in September and again in November). Having done so, I am satisfied to a high standard of probability that the panel's decision not to release the Applicant would still have been made if it had correctly understood what occurred in the subsequent investigation – in particular, that the 12 months' delay was the responsibility of the complainant. My reasons follow.

48. The messaging which passed between the user of S.Harrison04 and the complainant, which I have described above, establishes that the user was a paedophile with an interest in obtaining and sharing illicit images. The Applicant was a predatory paedophile; and the telephone from which the messaging emanated was his telephone traced to the location where he was residing. It is important to bear in mind that [redacted] and was in a part of the country remote from where his family and associates were. He was asked for an explanation; and his explanation involved another person, whom he did not identify, learning of his crimes (he suggested through reading his file in the AP office), borrowing his phone, impersonating him, messaging in his name, and sending his photograph which that person must have copied over from another social media application on his phone. This is to my mind an extremely improbable account – all the more so when it is borne in mind that the Applicant had been told not to lend his phone and had on any view been making risky use of social media for which he received a warning. The panel was fully entitled to reject his account, and I conclude that it would still have done so even if it had not misunderstood the subsequent investigation.

49. Once granted that it would still have reached these conclusions, the panel would still have been entitled to conclude that the Applicant's risk was not manageable in the community, and I consider that it would still have done so. The panel was entitled to conclude that a measure of openness, honesty and insight was necessary on his part and that external controls alone would not suffice.

Decision

50. For the reasons I have given I am satisfied that the application should be dismissed.

David Richardson
23 February 2023