

[2022] PBSA 13

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

### 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 17 October 2022 to direct the release of Walker (the Respondent).
2. I have considered the application on the papers. These are the oral hearing decision dated 17 October 2022, the dossier, the application for set aside dated 15 November 2022, and an addendum security intelligence report.

### Background

3. The Respondent received a determinate sentence of four years and six months in custody on 11 March 2019 for robbery. He also received a consecutive 12-month sentence for aggravated vehicle taking. He pleaded guilty to both offences. His sentence expires in August 2024.
4. The Respondent was aged 23 at the time of sentencing. He is now 27 years old.
5. The Respondent was automatically released on licence on 12 November 2021. His licence was revoked just over one month later on 17 December 2021, and he was returned to custody on the following day.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, and which came to light after the panel made its decision.
8. This submission is supplemented by information in the addendum security intelligence report to which reference will be made in the **Discussion** section below.

### Current Parole Review

9. The Respondent's case was referred to the Parole Board by the Applicant to consider whether to direct his release.



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10. The case proceeded to an oral hearing on 6 October 2022 before a three-member panel comprised of two independent members and a judicial chair. 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.

11. The Respondent's provisional release date was 17 November 2022.

## The Relevant Law

12. Rule 28A(1) 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(2), 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 rules 28A(1) and 28A(2). 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(4)(a)) **and** either (rule 28A(5)):

- 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

15. Submissions drafted by the Respondent's legal representative set out the Respondent's position and argues that the release decision should stand. These will also be considered in the **Discussion** section.

## Discussion

### *Eligibility*

16. 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's provisional release date of 17 November 2022 and argues that the condition in rule 28A(5)(b)(ii) is made out. It is therefore an eligible decision which falls within the scope of rule 28A.

### *Change in circumstances*

17. The application notes that the PPCS received information from the Respondent's COM on 11 November 2022 which stated that the Respondent had been discovered under the influence of a new psychoactive substance ('Spice') and the COM had significant concerns about his management in the community.
18. The addendum security intelligence report shows two intelligence reports dated 11 November 2022. Both are graded high reliability and note that the Respondent presented as under the influence and told staff he had taken Spice.
19. The Applicant submits that as the Respondent relapsed into drug misuse in a secure environment, his risk of harm was elevated to a level that would not be manageable in the community.
20. The Respondent submits that he had not been drug tested following the allegation of being under the influence, but accepts he had a lapse from which he is now completely recovered. He reiterates his commitment to engage with drug misuse services and the Probation Service in the community.

### *The test for set aside*

21. In determining the application for set aside, I must first consider whether the events described above would have affected the panel's decision to direct the Respondent's release.
22. In making its decision, the panel noted that drug and alcohol misuse are significant risk factors for the Respondent. It noted the COM's view that he could be managed in the community. The panel stated it was impressed with the Respondent's understanding of his risks and triggers and concluded that his risks could be managed in the community. It noted that any relapse would be obvious to his supervising officer.
23. Licence conditions included drug testing and engagement with ongoing drug and alcohol work and an alcohol tag.
24. Although, as the Respondent submits, he was not drug tested at the time, he stated that he had taken Spice and refers to a 'lapse' in his response to this application. It is therefore safe for me to find on the evidence before me, and on the balance of probabilities, that the Respondent had, in fact, taken Spice.
25. The Applicant argues that the Respondent's use of Spice constituted a significant change in circumstances. Rule 28A (b)(ii) sets a lower bar in that it only requires a change in circumstances, not a significant one.
26. However, it is not a change in circumstances for a prisoner with a history of substance misuse to lapse or relapse. Therefore, I do not agree that the Respondent's lapse amounted to a change in circumstances, significant or otherwise. The COM – one of the Applicant's witnesses – must have been aware that the Respondent was not clean of drugs at the time she stated he could be managed in the community, otherwise she would not have proposed drug and alcohol focussed

licence conditions as being necessary and proportionate to manage his risk. He was a known drug user then, and he still is now.

27. Even if I were to accept that there was a change of circumstances for the purposes of rule 28A, I am also not satisfied (for the same reasons set out above) that the direction for release would not have been given if the events detailed in the application had taken place before that direction was given.

28. The application therefore does not establish the requirements of rule 28A.

## **Decision**

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

**Stefan Fafinski**  
**1 December 2022**