

[2023] PBSA 16

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

### 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 (the panel) dated 24 February 2023 to direct the release of Marshall (the Respondent).
2. I have considered the application on the papers. These are the dossier of 170 pages, which included the oral hearing decision reasons (the decision), and the application for set aside dated 8 March 2023.

### Background

3. On 10 December 2021, the Respondent received a total determinate sentence of 16 months' imprisonment following conviction for affray, assault occasioning actual bodily harm, driving whilst disqualified, no insurance, criminal damage, assaulting an emergency worker and possession of heroin. His sentence expires on 28 March 2023.
4. The Respondent has previous convictions, including for similar matters. He was aged 28 at the time of sentencing. He is now 29 years old.

### Application to Set Aside

5. The application to set aside is dated 8 March 2023 and has been drafted and submitted by the Public Protection Casework Section acting on behalf of the Applicant.
6. The application to set aside relates to a positive drug test which had been taken four days after the decision was issued. Therefore, the Applicant relies on there being both new information and a change in circumstances as the basis for the submission that the decision should be set aside.

### Current Parole Review

7. On 27 July 2022, the Respondent was released at the automatic release point in his sentence by the Secretary of State. His licence was revoked and he was recalled to custody a few days later on 2 August 2022 as a result of him breaching his licence conditions and not attending at his designated accommodation as required.



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8. The Respondent's case was referred to the Parole Board by the Secretary of State to consider whether it would be appropriate to direct his re-release following the revocation of his licence.
9. A member of the Parole Board considered the Respondent's case on 28 October 2022 and directed his case to an oral hearing. This was the first review of his case following the recall. The case proceeded to an oral hearing on 3 February 2023 before a single member panel. The Respondent was not legally represented. Oral evidence was given by the Respondent's Prison Offender Manager (POM) and his Community Offender Manager (COM). The panel directed the Respondent's release.

## The Relevant Law

10. Rule 28A(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) 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.
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 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
    - i) information that was not available to the Board when the direction was given had been so available, or
    - ii) a change in circumstances relating to the prisoner after the direction was given, had occurred before it was given.
13. Under Rule 28A(5) an application to set aside a decision must be made within 21 days of the decision. However, if the application relies on 28A(4)(b) i.e it relates to new information or a change in circumstances then it must be made before the prisoner is released.

## The Reply from the Respondent

14. In accordance with the rules, the Respondent was asked if he had any representations to make within seven days. The Respondent did not submit any response.

## Discussion

## Eligibility

15. 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 release and argues that the condition in rule 28A(4)(b)(ii) is made out. It is therefore an eligible decision which falls within the scope of rule 28A.

## *New Information and/or a Change in Circumstances and the test for setting aside*

16. The Applicant relies on information received from the COM who reported a mandatory drug test taken on 28 February 2023 had been returned with a positive result for Pregabalin. The COM raised concerns that, although there would be drug testing in the community, the results can take four or five days to come back for their attention. Therefore, if the Respondent is not being open and honest about his drug misuse problems, the risk cannot be managed in its imminency. The COM explained that substance misuse heightens the risk to named known adults.

17. The Applicant submits that this is new information that was unavailable at the time of the decision or constitutes a change in circumstances and, as such, the decision to release ought to be set aside.

18. In the panel's decision, drugs and alcohol were highlighted as significant risk factors. I further note that, in the decision, the panel made it clear that the evidence relied upon was that there had been no current evidence of substance misuse (paragraph 2.5 of the decision). At paragraph 2.10 of its decision, the panel set out its view on the risk assessments provided by the COM and concluded that the risk was reduced due to a number of reasons, including the fact that there had been no evidence of substance misuse in custody and the Respondent appeared motivated to abstain.

19. Therefore, I am satisfied that the positive drug test constituted a change in circumstances which occurred after the decision was made (albeit the Pregabalin may have been taken before the decision was made). I am further satisfied that the direction for release would not have been given if the positive drug test had been received before that direction was given, and so Rule 28A(4)(b)(ii) is met.

20. Having decided that the panel's decision to direct release would have been affected, I must also consider whether it is in the interests of justice for its decision to be set aside. Having considered the information, I am satisfied that it is in the interests of justice for the panel's decision to be set aside. In my opinion, the interests of justice would not be served if the release of a prisoner took place in the knowledge he had been misusing substances in custody around the time that a direction for release had been given, which was a decision based on him not currently using substances and him having the motivation to continue to not do so.

## Decision

21. For the reasons I have given, the application is granted, and the final decision of the panel dated 24 February 2023 should be set aside.

22. At this stage, I would normally 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. However, due to the sentence expiry date in this case, there is insufficient time for any further review to take place.

**Cassie Williams**  
**3 April 2023**