

[2023] PBSA 30

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

### Application

1. This is an application (the Application) by the Secretary of State for Justice (the Applicant) to set aside a decision to direct the release of Nelson (the Respondent). The decision was made by a Panel of the Parole Board following an oral hearing on 5 December 2022. It is a decision which is eligible for the setting aside procedure.
2. I have considered the Application on the papers.

### Background

3. On 7 March 2000, the Respondent was sentenced to life imprisonment for two offences of murder committed on the same occasion. He pleaded not guilty but was convicted by a jury after trial. The minimum custodial term was set at 17 years less time spent in prison on remand and his tariff expired on 10 April 2016.
4. The Respondent was 20 years old when the murders were committed and he had many previous convictions dating from the age of 15. They included convictions for possession and supply of drugs, possession of an offensive weapon, unlawful wounding, burglary, and six convictions for assault occasioning actual bodily harm.
5. The index offences were committed when the Respondent was in the community on licence under a sentence of detention imposed for the unlawful wounding. On the night of 6/7 April 1999, having called on his two victims when already under the influence of alcohol and drugs, he spent some time in their company before stabbing them both to death.
6. The Respondent is now 44.

### Application to Set Aside

7. The Application was submitted in writing on 5 April 2023 by the Public Protection Casework Section (PPCS) of HM Prison and Probation Service on behalf of the Applicant.



8. PPCS submits that further information that affects the risk management assessment has come to light and there has been a change in the Applicant's circumstances. The grounds for the Application are considered in the **Discussion** section below.

### **Current Parole Review**

9. The Applicant referred the Respondent's case to the Parole Board by Notice dated 18 October 2021 to consider whether to direct his release and, if not, to advise about his continued suitability for open prison conditions. It was the 5<sup>th</sup> review held since the expiry of the Respondent's custodial tariff.
10. The Respondent's conduct during the initial part of his sentence was problematic and he continued to use heroin. His behaviour and level of engagement improved after he felt able to openly accept his sexuality. He remained adjudication-free from 2005 to 2012 when he then failed a drug test. The only subsequent adjudication was in 2016 for making threats when in Healthcare in order to facilitate a move to the Vulnerable Prisoners Wing.
11. By the time of his on-tariff review in 2017, the Respondent had addressed his core risk factors sufficiently for the panel on that occasion to recommend a transfer to open conditions. Those factors included a history of traumatic experiences, drug and alcohol misuse, poor emotional management and coping skills, impulsivity and a history of non-compliance. His insight had developed although there were problems in the application of skills to manage himself in times of difficulty. There was a need for support in times of stress which triggered an urge to take substances as well as a need to monitor his mental health medication in the light of a past willingness to self-medicate with illicit drugs.
12. The Secretary of State accepted the recommendation and the Respondent was moved to open conditions in November 2017. He was returned to the closed estate in October 2018 as a result of his DNA being found on a hidden mobile phone but no further action was taken and he moved back to open conditions in January 2019. Shortly after his return, he tested positively for benzodiazepines and in September 2019 he chose to take some cocaine offered by other prisoners.
13. The Panel conducting the review on 24 January 2020 declined to direct release because, as the Respondent agreed, there was a need for further progress on ROTLs to be demonstrated and for the resettlement and risk management plan to be fully developed.
14. The Panel conducting the Respondent's 4<sup>th</sup> review on 22 June 2021 concluded that a further period of testing was required and declined to direct his release. Objectives were set, including the further development of insight and coping strategies and work on risks associated with drug misuse.
15. By the time of the current review on 5 December 2022, the Respondent had remained compliant with the open prison regime, had successfully undertaken

further periods of overnight release on temporary licence, had incurred no proven adjudications and had secured paid employment with a firm which was willing to continue that employment following release. Whilst high, the OASys assessment of his risk of serious harm was not considered imminent. It was anticipated, that following a period of 6 months stability in the community it could be reduced to medium.

16. The Panel took into account the fact that, at the hearing, the Respondent had emphasised his intention to abstain from drug and alcohol use.
17. The Panel concluded that the Respondent had achieved a level of stability not seen in his earlier years in custody. The protective factors of employment, positive family relationships, and pro-social activities such as a wide-ranging interest in English literature, coupled with the deterrent effect of recall were considered sufficient to manage his risks. A place had been secured for him for a period of 3 months at designated premises in the area of his employment where he would be closely monitored.
18. Whilst waiting for the place at designated premises to become available, the Respondent remained in open conditions and continued with his external employment on a daily basis. On 26 March 2023 he was subjected to a random Mandatory Drug Test and the result indicated the presence of opiates. His immediate explanation to prison staff was that he had taken paracetamol but he quickly rectified that account. He explained that he had been experiencing headaches for three days and had accepted the offer of two co-codamol tablets from another prisoner as the paracetamol he took had not produced any result.
19. The Respondent maintained this position at the subsequent adjudication hearing when he pleaded guilty to the charge. The test result confirmed that the substance was co-codamol as he had explained and the sanction imposed was 14 days forfeiture of privileges and 14 days stoppage of earnings. A decision was taken by the Deputy Governor not to return him to the closed estate.
20. The Prison Offender Manager (POM) describes the Respondent as very remorseful and self-reproaching about the reckless and impulsive poor decision he made. He has since completed work in a relapse prevention group and will engage with the Change Grow Live group prior to release. The POM considers the Respondent's actions to have been a lapse in thinking rather than a lapse into opiate use and considers that the risks the Respondent presents are manageable within the current risk management plan.
21. The Community Offender Manager (COM) has expressed concern about the Respondent's initial dishonest account, his poor decision making, impulsivity, lack of consequential thinking, and preparedness to take risks, all of which have been identified previously as factors affecting the Respondent's risks. The COM and his manager are prepared to support the Respondent's release but the COM says that his recommendation is now more tentative. He also referred to the fact that when

the Respondent returned to the prison on one occasion in February 2023, he apparently smelt of alcohol, although he was not breathalysed.

## The Relevant Law

22. 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.

23. The types of decision eligible for setting 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 setting aside whether made by a paper panel under rule 19(1)(a) or (b) or by an oral panel after a hearing under rule 25(1) or by an oral panel making a decision on the papers under rule 21(7).

24. A final decision may be set aside under rule 28A (4) if it is in the interests of justice to do so **and** one or more of the conditions set out in sub paragraph (5) of that rule are satisfied. Those conditions are (a) the decision maker is satisfied that a direction to direct or not direct release would not have been made but for an error of law or fact or (b) the decision maker is satisfied that 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 that occurred after the direction was given, had occurred before it was given.

25. Rule 28A (9) provides that, where the decision maker directs that a final decision should be set aside, they must also direct that the case should be –

- (a) decided again on the papers by the previous panel or a new panel appointed under rule 5(1), or
- (b) decided again at an oral hearing by the previous hearing by the previous panel or a new panel appointed under rule 6(2)

## Parole Board Guidelines

26. The current Parole Board Guidelines include the following:

*"6.2 If an application to set aside a decision has been granted, the decision-maker can direct:*

- a) a further oral hearing or that a decision is to be made on the papers; and*
- b) a decision is to be made by a new panel or the original panel.*

*6.3 Where an application to set aside a decision to release has been granted by the decision-maker on the ground that there is new information or a change in circumstances, the setting aside panel can refer the matter back to the original*

*panel. The setting aside panel can direct that the original panel consider the new information and make a new decision in relation to that information.”*

## **The Reply by the Respondent**

27. The Respondent has submitted representations which were forwarded by the POM on 18 April 2023. He said that his actions in taking the co-codamol, for which he was extremely sorry, were impulsive and were the result of his continuous headache. He had let down himself and everyone who had placed faith in him. He was not in any way motivated to ‘abuse’ drugs for any mind-altering reasons. The Respondent accepted that he had been reckless and would take this seriously in mind because he knows the level at which his life is being scrutinised.

## **Discussion**

28. By a direction dated 2 May 2023 pursuant to rule 28A(11) of the Rules, the decision in this case was delegated to me, by the original set aside panel, as Chair of the Panel which made the direction for release.

29. The Respondent maintains that he took the co-codamol for medicinal purposes but that he should not have done so. A relatively low-level sanction was imposed in the subsequent adjudication process and a decision was then made not to return him to the closed estate.

30. Drug misuse, impulsivity and substance misuse lie at the heart of the Respondent’s historic offending behaviour and in particular the commission of the index offences. I have to consider the position the Panel would have been in if this episode had occurred before the decision to release him was made and the Panel had been aware of it. In that event, the Panel would have been in a position to question the Respondent directly and I have not had that advantage.

31. I have taken into consideration the latest detailed narrative reports by the POM and the COM. Notwithstanding the Respondent’s explanation which both of them have taken into account, I am of the view that the Panel would have questioned him closely about what happened and why. His response would have been vital to the issue of whether the Respondent’s risks had been elevated to the extent that they would not have been manageable under the risk management plan. In these circumstances, I have concluded that the Panel’s decision to release would not have been the same had the incident occurred before the hearing.

## **Decision**

32. For the reasons set out above, the application is granted and the decision of the Panel dated 5 December 2022 is set aside.

**HH Judge Graham White**  
**23 May 2023**