

**[2023] PBSA 67****Application for Set Aside by the Secretary of State for Justice  
in the case of McNeil****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 27 July 2023 to direct the release of McNeil (the Respondent).
2. I have considered the application on the papers. These are the oral hearing decision, the dossier, the application for set aside (dated 4 September 2023) and representations from the Public Protection Casework Section (PPCS) on behalf of the Applicant (dated 11 August 2023) and updated legal submissions (dated 5 September 2023) on behalf of the Respondent.

**Background**

3. The Respondent pleaded guilty to 2 offences of conspiracy to commit robbery, 2 offences of driving whilst disqualified and an offence of possessing cannabis. He was sentenced to a determinate sentence on 8 July 2019, when he was 21 years old, and received a total of 6 years imprisonment.
4. The Respondent was released automatically on the 7 May 2021 but was recalled on the 4 March 2022 following reports that he had allegedly been involved in robberies where firearms and other weapons had been used. He also tested positive for cannabis and had changed his address and moved into a property that was in breach of his exclusion zone and a breach of his licence conditions. The Respondent has always denied being involved in these robberies which were said to have been commissioned between the 20 February 2022 and 22 February 2022. and no further action had been taken by the police in respect of this matter, as confirmed by the Officer in the Case who provided evidence at the oral hearing.

**Application for Set Aside**

5. The application for set aside has been drafted and submitted by the Secretary of State for Justice and was served on the Parole Board by email on the 4 September 2023.
6. The application for set aside submits that when deciding the Respondent's case the panel made its decision in ignorance of new risk related information which was not known at the time, namely the existence of a further outstanding criminal charge. It is submitted that the direction for release would not have been made if information that was not made available to the panel when the direction was made, had been available.



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7. Comprehensive submissions have been provided. They submit that following completion of the Respondent's oral hearing the Community Offender Manager (COM) was made aware that the Respondent had been charged with a further matter of robbery, said to have been committed on the 14 January 2022. It is stated that this alleged matter has been adjourned for a court hearing date to be fixed (likely to be in October 2023). This alleged offence is said to have been committed whilst the Respondent was on licence. It is further argued that the proposed risk management plan (RMP) is no longer considered robust enough to manage the Respondent's risk on licence, in light of the new information provided. It is submitted that the decision of the 27 July 2023 should be set aside so that a full re-examination of the case be completed.

### 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 Respondent case proceeded to an oral hearing on the 18 July 2023 before a single member panel of the Parole Board. The panel consisted of a Judicial Member. The Respondent was 25 years old when his case was reviewed.
10. The panel directed the Respondent's release. A decision was issued on the 27 July 2023.
11. The panel held the Respondent's recall to have been appropriate.

### The Relevant Law

12. 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.
13. 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)).
14. 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 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
  - A direction for release would not have been made if information that had not been available to the Board had been available, or
  - 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. The Respondent's legal representatives have provided written submissions dated 5 September 2023.
16. They argue that despite the new allegations all reasonable efforts were made to ensure the Parole Board had the most accurate information at the time of the hearing and that oral evidence from an investigating officer confirmed that the Respondent had been eliminated from their investigations. Those instructed also highlight the positive progress made by the Respondent during the review period, and that it would be unfair to allow the Respondent's case to be set aside based on "*accusations that are not yet adjudicated through the Courts*".

## Discussion

### Eligibility

17. The application concerns a panel's decision to direct release following an oral hearing under rule 25(1). The Applicant argues that the condition in rules 28A(1) and 28A(4)(b) are made out. I agree with this submission. It is therefore an eligible decision which falls within the scope of rule 28A.

### New Information

18. As mentioned, the application notes that the direction for release would not have been made if information that had not been available to the Board had been available. It is submitted that at the time of the oral hearing neither the COM, nor the panel, were aware of an outstanding allegation for robbery which is said to have occurred on the 14 January 2022 whilst the Respondent was on licence. These matters remain outstanding.

### The test for set aside

19. In determining the application for set aside, I must consider the impact of this new information on the panel's decision to release the Respondent. This is a two stage process - (i) do I find there to be new information, and (ii) if so would a direction for release not have been made if that information had been known.
20. In relation to the information provided in the application I note that the Applicant refers to the new allegation as a 'robbery' whilst the Respondent refers to it as a 'burglary'. I note, however, that the matter has been sent to the Crown Court for a Plea and Case Management Hearing (PCMH) and that the Applicant's submission appears to include details from the indictment. As such it seems to me most likely that the correct charge is one of robbery based on the information before me. I will proceed on this basis. This is a serious allegation which if proven could be indicative of offences paralleling behaviour.

21. In relation to this information being novel, I have little difficulty finding this to be the case. Although an Investigating Officer did attend the oral hearing in



July 2023 to discuss the recall robbery matters, these matters were alleged to have occurred in February 2022. These recall allegations are clearly distinguishable from the allegation in the Applicant's application, firstly due to the dates involved, and secondly because the Respondent was eliminated from enquiries in relation to the latter matters but had been charged with the new matter. Furthermore, having reviewed all available evidence, I am satisfied that there is no reference to this new allegation in any of the other papers provided, including within the panel's decision itself.

22. As such I am satisfied that the information provided within the Applicant's application is novel and that the panel was not aware of the new allegation at the time it made its decision.
23. Turning now to the substantive matter, that a direction for release would not have been made if information that had not been available to the Board had been available, I must now consider the significance and relevance of the new information provided to the panel's assessment of risk and decision.
24. As noted, the Respondent's index offending includes matters of conspiracy to commit robbery and he was recalled back into custody 'primarily' due to allegations of further offending of a similar nature in January 2022. At the time of the hearing, the panel was clearly concerned about the recall allegations, to the extent of directing a police service witness.
25. Following the hearing, the panel appears to have directed the Respondent's release primarily due to the Respondent being eliminated from police enquiries (as set out in paragraph 4.3 of the decision). It seems to me, however, that if the panel had been aware that the Respondent was under investigation for further offending, which pre-dated the recall matters, the panel would have wished to explore these allegations with the same rigour.
26. Furthermore, unlike the recall matters the Respondent has, in fact, been charged with this new allegation and the case is proceeding through the Courts. I have no doubt that a direction for release would not have been made if this information had been known. The panel would most certainly have wanted to know more about this allegation, especially as it is serious, potentially offence paralleling, and could go directly to risk. As such I am persuaded that a direction for release would not have been made if information that had not been available to the Board had been available.
27. Having decided that a direction for release would not have been made if information that had not been available to the Board had been available. I must finally consider whether it is in the interests of justice for its decision to be set aside.
28. I am so satisfied. The interest of justice would not be served directing the release of a prisoner who appears to have outstanding matters, of a serious and offence paralleling nature before the Courts.



## Decision

29. For the reasons I have given, the application is upheld, and the decision of the panel on the 27 July should be set aside.

**Heidi Leavesley**  
**06 October 2023**

