

[2024] PBSA 34

## Application for Set Aside by the Secretary of State for Justice in the case of Myende-Horseford

### Application

1. This is an application by the Secretary of State for Justice (the Applicant) to set aside the decision to direct the release of Myende-Horseford (the Respondent). The decision was made by a panel after an oral hearing. This is an eligible decision.
2. I have considered the application on the papers. These are the dossier (215 pages), the oral hearing decision (dated 27 April 2024), and the application for set aside (dated 24 May 2024).

### Background

3. On 8 February 2019, the Respondent received an extended sentence consisting of eight years in custody followed by a four year period on licence following conviction for possession of a firearm with intent to endanger life.
4. The Respondent was aged 20 at the time of sentencing. He is now 25 years old.

### Application for Set Aside

5. The application for set aside has been drafted and submitted by the Public Protection Casework Section (**PPCS**) acting on behalf of the Applicant.
6. The application for set aside submits there is further information which came to light after the panel made its decision. It is argued that the panel would not have reached the same decision had this new information been known.
7. The content of the application will be considered in the **Discussion** section below.

### Current Parole Review

8. The Respondent's case was referred to the Parole Board by the Applicant to consider whether or not it would be appropriate to direct his release. This is the Respondent's first parole review.
9. The case proceeded to an oral hearing on 6 March 2024 before a two member panel including a psychologist specialist member. The panel heard evidence from the Respondent's Prison Offender Manager (**POM**) and his Community Offender Manager



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(**COM**). The Respondent was legally represented throughout proceedings. The Applicant was not legally represented.

10. After hearing full evidence, the panel adjourned for a full updated security report. Further written legal submissions were invited. The security report was provided (together with a later additional report from the Respondent's COM). The panel directed the Respondent's release.

### The Relevant Law

11. Rule 28A(1)(a) of the Parole Board Rules 2019 (as amended) 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.

12. The types of decisions eligible for set aside are set out in rule 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)).

13. 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 (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 given if information that had not been available to the Board had been available, or
- c) a direction for release would not have been given 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

14. The Respondent has submitted representations in response to the application which will be considered in the Discussion section below.

### Discussion

15. The Applicant submits that the COM has reported a significant deterioration in the Respondent's behaviour and compliance in custody which, in turn, has led the Probation Service to consider the proposed release and risk management plan will not be suitable or sufficiently robust to manage his risks in the community.

16. It is reported that the Respondent:

- a) failed a Mandatory Drug Test (**MDT**) for synthetic cannabinoids on 16 May 2024; and
- b) made a verbal threat to an officer on the same day.

17. The COM (via the Applicant) considers that being under the influence of alcohol or drugs is a risk factor. It is noted that there was a significant volume of intelligence regarding drugs within the prison estate.
18. In its decision, the panel discounted intelligence around substance misuse. It noted in its decision that “[the prison has] the capacity to drug test prisoners if they suspect misuse and did not test [the Respondent] despite recording intelligence. It is therefore inappropriate to rely on this information.”
19. The COM (via the Applicant) goes on to say “I am unable to say for certain whether this would have impacted the Parole Board’s directions...I do think it is something that they should be aware of” and concludes “I was not fully confident that [the Respondent] will comply with his licence...at the time of the oral hearing, and now the new intelligence reinforces my concerns and strengthens the validity of the security report intelligence”.
20. The Applicant argues that the panel would have reached a different conclusion if this information had been available at the time, since it may have placed more weight on the security intelligence.
21. The Respondent denies threatening the officer. His legal representative notes that there is no evidence that the matter has been proven at adjudication, and that there are no allegations of physical violence. It is argued that the COM is using the new allegations to reinforce the opinion they held at the hearing (and with which the panel did not agree) and that, in any event, drug misuse is not a primary risk factor in the Respondent’s case.
22. I note the most recent security intelligence relating to drugs dates from October 2023 and concerned a cannabis aroma from the Respondent’s cell. In other words, there has been no other intelligence to suggest any involvement in drugs misuse for around eight months. There is no evidence that the failed MDT has proceeded to adjudication, nor been proved. There is no evidence that the alleged threat to an officer has been adjudicated. The COM acknowledges that the panel may not have changed its decision.
23. The test for set aside is not whether a panel might have changed its mind. The statutory wording is clear. ‘Would not’ is materially different from ‘might not’.
24. On the evidence before me, I am not satisfied that the Respondent has established that there has been an increase in risk. The allegation set out in the application is (at the present time) unsubstantiated, and unadjudicated. There is no corroborating evidence. The Respondent denies the allegations. There is no evidence of physical violence. The Applicant cannot therefore fairly conclude on the evidence available that the Respondent presents an increased risk.
25. In conclusion, there is insufficient evidence of increased risk for me to find that the panel would have made a different decision had it known of the currently available information relating to the failed MDT and alleged threat to staff.

## Decision

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

**Stefan Fafinski**  
**06 June 2024**