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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 116 (Admin)



CO/3210/2018

Royal Courts of Justice

Tuesday, 22 January 2019

Before:

MR JUSTICE HOLMAN

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
GRANTHAM

Claimant

- and -

PAROLE BOARD FOR ENGLAND AND WALES

Defendants

- and -

SECRETARY OF STATE FOR JUSTICE

Interested Party

MR A. FITZPATRICK (instructed by Bhatt Murphy) appeared on behalf of the claimant.

THE DEFENDANTS did not appear and were not represented.

THE INTERESTED PARTY did not appear and was not represented.

J U D G M E N T
(A s a p p r o v e d b y t h e J u d g e)

MR JUSTICE HOLMAN:

1 This is a claim for judicial review of a decision of the Parole Board. The decision letter is undated but was communicated on 22 May 2018 and appears to date from on, or about, that date.

2 The Parole Board are the defendants to this claim. They have filed an acknowledgment of service in which they state that they are, for these purposes, a court and that they take no position on outcome. They have not attended this hearing.

3 The Secretary of State for Justice is an interested party. By an email dated 31 October 2018, he stated that he "wishes to maintain a neutral stance" and, accordingly, that he would not be instructing counsel or submitting any representations.

4 I have thus heard only from Mr Andrew Fitzpatrick, counsel on behalf of the claimant, and neither the Parole Board nor the Secretary of State for Justice are in attendance. I must nevertheless, as I do, consider the case with the utmost care; and this morning Mr Fitzpatrick took me painstakingly through the decision letter and the criticisms he makes of it.

5 The essential facts are as follows. The claimant is now aged 46. He already had a long and serious criminal record. The Court of Appeal Criminal Division summarised it as follows:

"He has previous convictions including a number of offences of violence and public disorder between 1992 and 2003. Most significantly, he has previous convictions, three in all, for assault occasioning actual bodily harm, and in April 1999, two convictions for causing grievous bodily harm with intent, for which he received a sentence of 42 months'

imprisonment. We bear in mind that those latter offences did not involve the use of a knife but the use of a piece of wood as a weapon.

The appellant also was cautioned for a further offence of assault occasioning actual bodily harm in August 2006."

6 The index offence was committed on 18 September 2008. There was a long standing association and friendship between the claimant and the victim. The Court of Appeal Criminal Division said "it appears that each of them had a problem with drink".

7 The incident began at about 5 a.m. when the victim went unannounced to the claimant's flat. Both had been drinking and both continued to drink. Many hours later, around mid-day, an argument erupted during which the claimant stabbed the victim in his back and again in the chest and kept stabbing at him.

8 The victim escaped into the rear garden, where the claimant continued the attack, cutting the victim's face and later striking the victim with a metal pole, and kicking him while he was on the ground. The victim suffered serious injuries, including a punctured lung.

9 The claimant was arrested that day and his period in detention began. He later pleaded guilty to wounding with intent to cause grievous bodily harm. He was sentenced to an indeterminate period of imprisonment for public protection (IPP), a form of sentence which has since been abolished.

10 There was no appeal from the sentence of IPP. The judge had fixed a minimum determinate period of 4 and a half years. The Court of Appeal Criminal Division reduced that to one of 3 years and 4 months, less the period already spent on remand.

11 As of today, the periods the claimant has actually spent in custody are about 7 years 9 months until his first release on licence, and 1 year 8 months since his recall, making a total

of about 9 years 5 months, or nearly three times the minimum term fixed by the Court of Appeal Criminal Division.

12 During his first period of imprisonment, the claimant was transferred to an open prison. By a decision dated 24 April 2016, the Parole Board directed his release on licence subject to very clearly specified conditions. He was actually released on licence on 28 June 2016.

13 The claimant's parents own and run a business in Kettering, which specialises in the restoration of antique furniture, a trade at which the claimant himself is skilled and experienced. The claimant thus had ready employment to which to return, and his stated ambition is to take over the business from his parents when they retire. His father is in his later 60s, and very unwell. During his period on licence, the claimant did work in this business and the evidence is that he did so conscientiously and well.

14 The claimant appears also to have adhered to all the conditions which were imposed, until a very regrettable event on 10 May 2017. The conditions required him to sleep at approved premises and imposed a curfew from 11 p.m. to 7 a.m. On 10 May 2017, the claimant was seen to remove his possessions from the approved premises and he never returned to sleep there that night. The claimant did, however, present himself to his Probation Office the next day, 11 May 2017. On that day, his licence was revoked by the Secretary of State for Justice and he was recalled to prison.

15 The claimant appears to have been informed of that fact on 12 May, and told to surrender to the police. He did so 3 days later on 15 May 2017, since when he has been continuously detained.

16 The formal reasons for recall were that:

"Your alcohol consumption had increased and you left the approved premises in the morning of 10 May 2017, with your belongings and

failed to return for your 11 p.m. curfew. Staff at the approved premises tried to contact you but they were unsuccessful and your whereabouts were unknown ... In view of the offences for which you were originally sentenced, the risks suggested by your offending history and your behaviour as described in the Recall Report completed by the Probation Service, the Secretary of State revokes your licence and recalls you to prison."

17 There was thus the discrete absence on the night of 10/11 May 2017, but also a more general concern that the claimant's alcohol consumption had increased. It will be recalled that alcohol appears to have been significant in the index offending.

18 The Secretary of State for Justice referred the case of the claimant to the Parole Board to consider whether he could again be released on licence, or in any event (and a separate and discrete matter) whether he could be transferred to open conditions. After an oral hearing, the decision letter under review concluded that:

"... the risk you pose remains too high to be safely managed, either in open conditions or in the community. You should remain in the closed estate."

19 The claimant applied within time for permission to apply for judicial review, and Sir Ross Cranston granted permission on 19 September 2018. By ground 1 of his grounds of claim, Mr Fitzpatrick makes a discrete challenge to the decision not to recommend transfer to open conditions. I can deal with that shortly, for in my judgment it must succeed. Section 239(6) of the Criminal Justice Act 2003 empowers the Secretary of State to give to the Parole Board directions as to the matters to be taken into account in discharging their functions. Manifestly, the Parole Board must heed and apply those directions. Such directions include published directions on "Transfer of indeterminate sentence prisoners to open conditions".

- 20 Paragraph 7 of those directions provides that when evaluating the risks of transfer to open conditions against the benefits the Parole Board must take "main factors" into account, which are then specified.
- 21 In the "Introduction" to their decision letter, the Parole Board set out those factors correctly and substantially verbatim. They include at (c), the extent to which the prisoner is considered trustworthy enough not to abscond, and at (d), the extent to which the prisoner is likely to derive benefit from being able to address areas of concern and to be treated in open conditions environment such as to suggest that a transfer to open conditions is worthwhile at that stage.
- 22 Although the Parole Board set out those factors in their "Introduction", they never went on to address them. Throughout the remainder of their letter and reasons, no clear, separate and discrete consideration is given at all to whether, even if he cannot at this stage be released on licence into the community, the claimant might nevertheless be transferred to open conditions.
- 23 In this regard, trustworthiness and the likelihood of absconding is obviously a very material matter. It is nowhere addressed. All that the Parole Board say in their final concluding paragraph is that:

"The risk that you pose simply cannot be managed in the community or in less secure conditions."

and that, as I have already quoted:

"The risk you pose remains too high to be safely managed either in open conditions or in the community."

- 24 In my view, the Parole Board have not demonstrated that they gave any real separate and discrete consideration to transfer to open conditions, nor to the "main factors" which they

are directed to take into account by the Secretary of State for Justice. In so far as it relates to transfer to open conditions, the decision must in any event be quashed.

25. I turn, however, to the more fundamental question of release on licence. Undoubtedly, the decision letter does directly consider this issue at some length and in detail. Mr Fitzpatrick does, however, mount various grounds of challenge, although, as Sir Ross Cranston observed when he granted permission, the grounds really all "meld" into one another.

26. The Parole Board heard oral evidence from the claimant's offender supervisor in the prison, Ms Grewal, and his offender manager in the community, Ms Pratt. Each of them considered that risk could not be safely managed and that it was too soon to consider re-release on licence; in particular until the claimant had successfully completed psychological work to address personality disorder. Since that was the view of both the professionals who knew the claimant, it is not particularly surprising that the Parole Board themselves came to that overall conclusion and view.

27. I am, however, satisfied that there are some errors and omissions in the decision letter and approach of the Parole Board which fatally undermine the reliability of their own conclusion.

28. First, at paragraph 4, under the heading "Risk factors", the Parole Board state:

"The circumstances leading to the recall suggest that issues linked to poor thinking skills, pro-criminal attitudes and alcohol misuse may remain problematic for you."

29. Undoubtedly, the circumstances in which the claimant was away overnight from the approved premises on 10/11 May 2017 indicate that a problem of poor thinking skills persisted. The claimant was very foolish that night.

30. There was evidence also from Ms Pratt of alcohol misuse, in that (although there was no condition forbidding him from consuming alcohol) he attended at Probation smelling of alcohol and with slurred speech. But there was simply no recent evidence of "pro-criminal attitudes" and no evidence of any criminal offending. There had been one incident with his landlord whilst he was released on licence in which, however, as the Board accepted, the claimant was considered to be the victim and not the perpetrator.
31. "Pro-criminal attitudes" is only one short phrase, but in my view that reference to pro-criminal attitudes betrays a confused or skewed attitude by the Parole Board to an obviously important factor: is there evidence of a continuing criminal mindset?
32. Second, on page 5 of their decision letter under the heading "Evidence of change since last review and progress in custody" the Parole Board referred to an incident in which the claimant's food or drink may have been spiked with drugs by another prisoner.
33. They continue:
- "The panel accepts that there is limited other evidence of you misusing drugs since recall ..."
34. That appears to be unfair and mistaken. So far as I am aware, there is no other evidence of his using drugs since recall.
35. Third, at paragraph 7 of the decision letter, under the heading "Evaluation of effectiveness of plans to manage risk", the Parole Board say, "you have refused to engage with the Personality Disorder pathway team."
36. This appears to be incorrect or, at any rate, an unfair statement of the evidence. There is a reference to this effect in the written report of Ms Pratt, dated 14 December 2017, and now at bundle page D91.

37. However, the more up-to-date oral evidence of Ms Grewal was to the effect that the claimant does engage with the personality disorder work with the prison psychologist, although "progress is slow."
38. Fourth, at paragraph 6 of the decision letter, under the heading "Panel's assessment of current risk", they record his assessed risk, using standard assessment tools, of further offending. In fact, that assessed risk had in one respect reduced since the previous release on licence in that the risk of harm to the victim in the index offence is now assessed as "medium", whereas in 2016 it was still assessed as "high." The Parole Board do not appear to have noted that fact.
39. Fifth, at paragraph 7 of the decision letter, there is a section headed: "Evaluation of effectiveness of plans to manage risk." On a careful reading of that section, it does not contain any evaluation of effectiveness. The Parole Board state that the panel considered that the risk management plan was robust, but then identify a number of negative factors (one of them, incorrectly, that the claimant had "refused to engage" with the pathway team.) The paragraph does not, however, then actually consider whether, balancing all the factors, the risk management plan can be "effective".
40. Sixth, and related to that, there is very little reference in any of the reasons to the availability of work with the claimant's parents and his apparently good working record when previously released on licence. This is potentially a strong protective factor, since the claimant claims to be highly motivated to help his parents in their business and to succeed them in it. It clearly required to be considered, but was not expressly considered by The Board at all.
41. I do not single out any one of the above reasons which, as Sir Ross Cranston said, clearly "meld" together; but when viewed cumulatively, they satisfy me that this decision is not properly reasoned. It does take into account some irrelevant or wrong factors. It does fail

to take into account some relevant and important factors. It is not reliable or fair and it cannot stand, either in relation to transfer to more open conditions, or, more fundamentally, re-release on licence.

42. I will accordingly allow this claim for judicial review. I quash the decision letter dated on, or about, 22 May 2018. I direct that the Parole Board must reconsider these matters from scratch and with a fresh and open mind. Clearly, fresh reports will be needed from the prison and probation services, and the various interested bodies, including the claimant, may wish to assemble and adduce further evidence. But I have already referred to the very long time indeed that this claimant has now been detained relative to the determinate period as fixed by the Court of Appeal Criminal Division. I cannot make any order or direction as to expedition, but I express the hope that, consistent with such proper preparation, this matter can be reconsidered as a matter of expedition. These proceedings themselves have now occupied over 5 months since issue, and it is now 8 months since the decision which I have now quashed.

Are there any consequential matters, Mr Fitzpatrick?

MR FITZPATRICK: My Lord, certainly we are very grateful for the request for an expedition.

MR JUSTICE HOLMAN: Yes, well, that is there in the judgment which will no doubt be transcribed.

MR FITZPATRICK: Well, there has to be referral from the Secretary of State for Justice to the Parole Board.

MR JUSTICE HOLMAN: Yes. Well, I hope he will do that with expedition. Actually, I don't know that there does have to be a referral. He has already referred it to the Parole Board. They have made a decision which is now quashed, so they have already got a referral.

MR FITZPATRICK: Yes, I do seem to remember that discussion being had in one of the cases we have referred to. Therefore, can we simply then ask for a detailed assessment of the claimant's publicly funded costs?

MR JUSTICE HOLMAN: Are you asking for anybody to pay them or just to have an assessment of them?

MR FITZPATRICK: No, an assessment.

MR JUSTICE HOLMAN: Yes. There will be an order for a detailed public funding assessment of the claimant's costs. Anything else?

MR FITZPATRICK: Thank you, my Lord.

MR JUSTICE HOLMAN: Will you be able to draft an order to encompass all that?

MR FITZPATRICK: We will. Yes, we will.

MR JUSTICE HOLMAN: Well, if you would kindly do that, lodge it with the associate, who will then no doubt lodge it with my clerk, I will hopefully approve it and that will be the order. Anything else?

MR FITZPATRICK: No, thank you, my Lord.

MR JUSTICE HOLMAN: I will keep these papers for when I correct the judgment.

Thank you all very much indeed. Thank you, Mr Fitzpatrick, and the formidable team who surround you.

CERTIFICATE

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**** This transcript has been approved by the Judge (subject to Judge's approval) ****