The Dilemma of Maintaining Innocence

Introduction

It is 20 years ago since the Birmingham six were released as innocent men, but the stark reality is that if their appeals has not been successful they would in all likelihood either have died in prison or still been incarcerated because of their absolute insistence of innocence and wrongful conviction.

The Parole Board and Prison Service will say that there is no rule or policy which automatically prevents a lifer who denies guilt from progressing through the lifer system, or from being released. This may be technically correct but it is a highly mendacious line of argument because clearly denial of guilt does affect the timing of release and despite the ongoing debate around prisoners maintaining innocence in the last few years neither the Prison Service or the Parole Board have made any real progress to resolve the issue. My understanding is that only 2 mandatory life prisoners have ever been released by the Parole Board on tariff (i.e their earliest date of release) whilst maintaining complete denial of the crimes for which they were convicted. Suzanne May, who has always maintained her innocence (and is still seeking to overturn her conviction) of the murder of her aunt was released in 2005, and most recently John Taft in April of this year.

Indeterminate sentenced prisoners who maintain their innocence are especially affected. It is they who have to jump through a series of hoops, relying on the prison service lottery to provide them with courses to 'show a reduction in risk' and so as to ultimately satisfy the Parole Board that they are ready for release. And it is they who continue to be confronted with the same problem: either admit guilt and comply with their sentence plans, or face the prospect of serving many years over their minimum tariffs and possibly never achieving parole.

It is currently for the courts and the independent Criminal Cases Review Commission (CCRC) to review alleged miscarriages of justice in England, Wales and Northern Ireland. The effectiveness or otherwise of these institutions is not a matter of discussion in this paper. However prisoners whose appeals have failed for whatever reason, or whose cases are ongoing are left to satisfy the key consideration to granting release on parole or life licence; namely is their current risk to the public manageable? And when looking at this the Prison Service and Parole Board will always assume that the prisoner was rightly convicted.

Risk Assessment

Innocence-maintaining prisoners present many problems for the risk assessment process, problems which will only intensify with the exponential growth in the number of IPP, high risk, determinate and recalled prisoners needing risk assessment, coupled with the acute shortage of appropriate

offending behaviour programmes and prison psychologists working on an individual basis with such prisoners.

The starting point, one would have thought, is that if someone is innocent they are not a risk to society. The credibility of such claims could be looked at, through for instance, the steps taken by a particular prisoner to clear their name, their behaviour in prison and their attempts to undertake work whether related to their index offence or not. However, neither the Prison service nor Parole Board seems currently able, or indeed willing, to look at this as a part of their assessment processes.

On the specific issues of the validity of denial as a measure of risk, this is based purely on clinical wisdom rather than any scientifically founded measure of risk[1] . On a more general level, risk can be calculated only to a limited extent anyway. However, whilst the Parole Board are aware that a maintaining of innocence is not an automatic bar to release and that it is unlawful for the Board to refuse to consider the question of release solely on the ground that the prisoner continues to deny guilt[2] increasing and unhelpful political pressures on the Prison service and Parole Board[3] has meant a risk averse culture permeates across these assessments. Factors such as denial of guilt, attitudes to treatment and absence of risk reduction work are all therefore added into the mix of risk assessment despite their neither being reliable or valid.

Another related issue is that both the Prison Service and Parole Board have formed a view that the assessment and minimisation of risk is premised through the successful completion of behaviour modification programmes which require an acknowledgement of guilt and a preparedness to discuss self-critically the salient features of the offence. This presents an obvious problem to prisoners who continue to maintain their innocence, as they are unable to co-operate over something they have not done. Programmes such as the Sex Offender Treatment Programme (SOTP), Controlling Anger and Learning to Manage It (CALM) and the Cognitive Self Change Programme (CSCP) depend on an offender admitting to and discussing their offences, either during the initial assessment stage, or during the programme itself, and so are not open to individuals who completely deny their offences. Prison Service Index (PSI) 2011/11 (prison service guidance) deals with the specific issues relating to prisoner's convicted of sex offences who continue to protest their innocence. The PSI differentiates, in terms of sentence plans and whether SOTP should be included, between appellants (who have appealed and can produce a criminal appeals number issued by the criminal appeal court) and those who are either not appealing or have had their appeal rejected. Someone whose case is before the CCRC or ECHR is not an appellant as neither has the power to overturn a conviction. It also

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[1] Hood, R, Shute, S, Feilzer, M, and Wilcox, A. (2002). Reconviction rates of serious sex offenders and assessments of their risk. *Findings 164*. London: Home Office.

[2] R v Secretary of State for the Home Department ex p Oysten (2000) Independent 17 April, CA.

[3] See the comments of Sir David Latham around the pressures brought to bear by John Reid and David Blunkett in www.guardian.co.uk/uk/2010/Mar/31/parole-chief-warns-overraction.

differentiates between 'suitability' and 'readiness'. A prisoner who protests his innocence is technically suitable for SOTP but not ready. However SOTP remains on his/her sentence plan and/or can be re-set as a future objective to help 'overcome their denial'.

Management of "deniers" in prison

In my own experience it is a fallacy to suggest that it is common for prisoners to deny the offences for which they have been convicted. It is true that some do and this may be for all sorts of reasons. They may not be able to accept what they have done, may be trying to protect others, or may not want people close to them to know the truth, or in more complex cases believe themselves legally guilty but factually innocent (mercy killings or joint enterprise being obvious examples). Finally of course they may be entirely innocent.

PSO 4700 sought to address the issues of 'deniers' (as they are referred) by at least acknowledging that they form part of the prison population and their stance on guilt or innocence should be recorded. However the real difficulty is that it fails to offer any sensible approach to those who might have a genuine case of miscarriage of justice. Such individuals are simply left in limbo. Even if they undertake courses, they are unable to give a full and frank account of their offence for the purposes of analysis for obvious reasons, given their claim that they did not commit it; simply looking at previous and often minor offences is not going to demonstrate a reduced risk in, for example, the case of murder.

The Incentive and Earned Privileges Scheme (IEPS) highlights another difficulty. Since the introduction of the IEPS (see Prison Service Orders 2250 and 4000) there have been a number of challenges brought by prisoners who, because they have maintained their innocence and therefore have not fully participated in their sentence planning, were denied access to the Enhanced regime despite impeccable behaviour. In *Hepworth*[4] five prisoners maintaining their innocence challenged various decisions to do with parole, categorisation and refusal to grant Enhanced status within the IEPS at HMY Wymott on the basis that improper account was taken of the denial of guilt. The IEP policy, which prevented prisoner's from progressing to Enhanced because they were not participating in SOTP was held to be lawful. Arguments raised in other similar cases, including the fact prisoners denying their offence are discriminated against in their access to the right to family life under article 8 of the ECHR, as prisoners on Standard regime for instance receive less or shorter visits than those on Enhanced[5] have consistently been rejected by the courts[6].

An added complication is that PSI 33/2009, which came into force on 1st January 2010, has introduced Pre-Tariff Sift Reviews. The effect of this is that

[4] R v Secretary of State for the Home Department ex p Hepworth and others (1997) EWHC 324 (Admin)
[5] R v Secretary of State for the Home Department ex p Potter and others (2001) EWHC 1041 (Admin)
[6] R (Green) v Governor of HMP Risley and Secretary of Sate for the Home Department (2004) EWHC 596 (Admin)

all lifer cases are now subject to a prison service assessment, as to their suitability for a Parole Board review 2 years before their tariff date expires. The test applied is whether there is a reasonable prospect or 'is there a case for consideration' for open conditions by the Parole Board? PSI 33/2009 impacts on all prisoners but its impact is most keenly felt on those maintaining innocence and who for that reason have not been able or willing to undertake offending behaviour programmes. It is also part of a move away from full judicialisation of the parole and release decision pertaining to lifers and those who maintain their innocence, along with things such as the removal (by the Parole Board (Amendments) Rules 2009) of the right to an oral hearing. Oral hearings are essential for those maintaining their innocence. Given that their paper dossiers are unlikely to reflect favourably on them if they are not engaging with courses etc, prisoners maintaining innocence rely on oral hearings to put forward their case and their side of the story to the Parole Board.

Conclusions

The Parole Board has been given only one power by Parliament which is to decide whether or not to release a prisoner. There is no mechanism to allow the Board to look behind the court's verdict and this is not going to change. Therefore those advising innocent prisoners (and those whose decision making affects such prisoners) need to try to operate within this framework and look at how the crucial question of risk assessment in particular is dealt with.

There is a need for the risk assessment process to take greater account of all forms of innocence assertion. In particular, the nature and extent of, and reasons for, any assertion of a prisoner's innocence should be explored and challenged in much greater detail than at present; using perhaps archived material that may not be readily available in prison files or the parole dossier.

The key issue affecting a lifer's progress should not be weighted to, as it seems currently, what offending behaviour work has been undertaken, but whether or not the risk he or she poses to the public is acceptably low. This can be measured (as it used to be) through their interaction with prison and probation staff and importantly how they conduct themselves with other prisoners. Prison lawyers can also do their bit by obtaining (within the restrictions of current legal aid funding) expert reports to challenge often intransigent prison and probation risk analysis.

The Prison Service themselves also need to accept that their general presumption that the conviction was correct does not meet the case of the person who is genuinely innocent, but who has exhausted all avenues of appeal without success. Suitable sexual and violent risk reduction work should be devised for those maintaining innocence. Furthermore, one to one motivational work should be more readily available for such prisoners, particularly when their stance is holding back their sentence progression. Reports and assessments, including the OASys form, should be adapted to

allow for details to be provided about the maintenance of innocence and the reasons for that position.

Finally prison and probation report writers, when commenting on offending behaviour programme work, should distinguish between cases of non-cooperation or refusal to participate by the prisoner and cases where the prisoner is excluded from courses on account of their denial.

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