PRISONERS' RIGHTS

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PRISONERS' ADVICE SERVICE

JUSTICE BEHIND BARS

The Prisoners' Advice Service (PAS) is a charity that provides free legal advice and information to people in prison in England and Wales. We produce this bulletin, setting out case law, Ombudsman's decisions and legislative and policy changes relevant to people in prison. The PLRB is free to serving prisoners.

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HERBERT SMITH FREEHILLS

Contents

COVID-19 POLICY GUIDANCE

Whilst prisoners have basic rights under the European Convention on Human Rights and the Prison Rules 1999, these are not absolute rights. They can legally be interfered with when it is necessary on a number of grounds, including for public safety or the protection of health, and the law allows such interference. The restrictions that are currently in place are being justified on public health grounds, with the Ministry of Justice and HMPPS maintaining that their priority is providing a safe environment for those working and living in prisons. This makes it difficult to challenge the limitations being imposed on those in custody.

There is little guidance publicly available on the operation of prisons during the pandemic. The main documents are: COVID-19 Operational Guidance – Exceptional Regime & Service Delivery; COVID-10: National Framework for Prison Regimes and Services; Preventing and controlling outbreaks of COVID-19 in prisons and places of detention; and HMPPS Cohorting & Compartmentalisation Strategy for prisons during COVID-19. PAS can provide copies if requested. This centralised approach guides and governs how HMPPS and prisons are broadly operating during the pandemic, however each individual prison is allowed to operate independently according to their local circumstances, under the advice of their local Public Health England team. This means that regimes can vary greatly, both between prisons and even within the same one, just at a different time, depending on factors such as local restrictions, outbreak status, and a prison's ability to deliver different parts of the regime like education.

Now that England has returned to a tiered system of restrictions, regimes may vary more greatly than they did during the second lockdown, particularly as tiers are reviewed regularly. This means that there are no hard and fast rules on what to expect in prison currently. Notwithstanding this, basic elements of the prison regime are expected to continue, unless wholly unworkable.

Reverse cohorting

All prisoners arriving at a prison from the community must be isolated from the rest of the prison population for 14 days, or until two negative test results are received within a period of at least seven days, although this is only available in prisons with routine prisoner testing in place. Reverse cohorting also applies to prisoners transferring from a prison deemed high risk to a lower risk prison, and those who have been out of the prison for longer than a single day. Prisoners who are reverse cohorting should receive a standard regime including access to showers and exercise, but access to other activities can be limited as contact with others must to be limited.

Protective Isolation

Prisons are following the general public health guidance on self-isolation. All prisoners who are symptomatic must isolate for a minimum of 10 days, preferably within in a single cell, from the day the symptoms began until they are symptom free (aside from a cough or loss of taste or smell as these can linger) and well. Any contact of a symptomatic or confirmed Covid-19 case must isolate for 14 days, in line with government guidance for those in the community. Those in protective isolation should receive regular health and wellbeing checks.

The regime offered to those in protective isolation can vary depending on the local circumstances. Access to showers and open air are expected to continue where they can be delivered in a covid safe way, however this is subject to advice from the local public health team

and in particular the Outbreak Control Team's advice if involved. As health partners operate at a local level, they may adopt different approaches to other similar teams, applying national health guidance in a different manner, and this can result in varied outcomes.

Shielding

Prisons must offer shielding facilities for any prisoner that is clinically extremely vulnerable who wishes to shield. This can either be done through a designated Shielding Unit or separate shielding regimes for each prisoner in an individual cell. Those shielding must be offered the opportunity to exercise in the open air daily and be offered additional support.

Testing

Arrangements should be made for any prisoner with symptoms of Covid-19 to be tested immediately.

According to the Government, weekly testing will be available to staff in prisons starting this month, although no date for this has been provided.

Face masks

Under HMPPS' face mask strategy of October 2020 there are three tiers of activity or area which govern whether a face mask must be worn by prison staff. Tier One covers nationally determined use of face masks, where their use is mandatory as part of national Safe Operating Procedures. This tier includes tasks like searching, escorts and delivering meals. Tier Two covers locally determined use, where a risk assessment in a specific prison has detected areas or activities of increased risks making it necessary for the mandatory use of face masks. This could include areas with poor ventilation or if there is an outbreak. Tier Three is individual choice, where staff are not required to wear a face mask but can choose to do so if they wish.

This means that staff do not always have to wear a face mask whilst in the prison, but only where either national or local policy requires them to. There will also be staff members who are exempt from wearing a face mask for health reasons, either physical or mental, and therefore do not have to wear a mask at all.

Access to healthcare

Prisoners should still be able to access healthcare services, albeit there might be a delay if they are dealing with an outbreak or working with a reduced team due to isolation or sickness. Face to face appointments are allowed where they are needed, but alternative methods of assessment and advice are preferred where possible.

Activity and progression

All unnecessary contact, including education, group worship, and offending behaviour courses, was suspended during the initial lockdown. Although prisons could reintroduce them where risk assessments were conducted and approved by HMPPS after this was lifted, not all prisons did so. Access to some education, work, faith services and gym can be provided now, where risk assessments have been completed, in addition to 'domestic entitlements' which includes exercise/time in the open air, but it will be dependent on local circumstances, including which tier the prison is in and whether there are any positive cases. Equally, offender behaviour programmes can be reintroduced but they will likely be conducted on a 1-2-1 basis or in small groups to allow for social distancing.

Visits

Social visits had been re-established in the summer, albeit significantly different to how they were before, however they

were all suspended when the second national lockdown was imposed. Such visits will gradually start again in various parts of the country but not in Tier 3 areas where non-essential travel and the mixing of households is prohibited. Prisons may be willing to make exceptions for compassionate reasons. Prisoners should receive £5 pin credit a month to support family contact.

Many prisons now have secure video call facilities, known as purple visits, which are free for both prisoners and their families.

Prisoners can receive legal or official visits if absolutely necessary, but alternatives such as video links should be used where possible.

Release schemes

The End of Custody Temporary Release scheme is no longer operating however temporary release under a Special Purpose Licence for Covid-19 purposes is still available for pregnant women, women with their babies in custody, and those defined by the NHS guidelines as clinically extremely vulnerable.

HDC is operating and some ROTL is accessible depending on the location and nature of the ROTL.

Although restrictions are being imposed on public health grounds, it does not mean that a prisoner cannot challenge them. Any prisoner who feels that they are unjustly being denied elements of their regime can submit a complaint. Certain situations, though probably limited, may give rise to a possible legal challenge in court. Prisoners can contact PAS either by letter or call the telephone advice line for advice.

CASE REPORTS

SENTENCING: IMPOSITION OF EXTENDED SENTENCES ON RECALLED INDETERMINATE PRISONERS

R v Baker & Richards [2020] EWCA Crim 176

This case concerns an appeal against the imposition of extended sentences on two prisoners, one of whom was already serving an IPP and the other a life sentence, both of whom had been recalled. Mr Baker and Mr Richards submitted that it was wrong to impose an extended sentence in respect of new offences, given that their indeterminate sentences already provided sufficient public protection.

Background

Mr Baker and Mr Richards had each been released on licence at the time that they committed further offences. Mr Baker had been released on licence from an indeterminate sentence for robbery, and Mr Richards from a life sentence for murder. Shortly after release on licence, Mr Baker and Mr Richards had each committed robbery offences to which they had pleaded guilty.

Mr Baker was given an extended sentence of 10 years 4 months, with an extended licence period of 5 years. Mr Richards was given an extended sentence of 11 years, with an extended licence period of 3 years.

In their conjoined appeal, both prisoners argued that it was wrong in principle, or manifestly excessive, to impose an extended sentence when they were already serving indeterminate sentences. They argued that either the statutory test for an extended sentence was not met or it would have served no legitimate purpose because the purpose of the extension period is to provide protection, and it is difficult to see how the

extension period would provide additional protection.

HELD

The court held that it was bound by the previous decisions of R v Smith [2011] UKSC 37 and R v J (M) [2012] EWCA Crim 132. Smith had upheld a sentence of IPP on a person serving a life sentence, who had been recalled, having committed a series of robberies whilst on licence.

The decisions in Smith and J (M) held that:

i. it is neither necessarily unlawful nor wrong in principle for an indeterminate sentence to be imposed on an offender who is already serving an earlier indeterminate sentence; and

ii. The judge must decide whether the defendant poses the risk envisaged by the statute, not on the basis that he or she is already in custody at the date of the sentence, but on the basis that he/she is not.

The court in these cases concluded that the conditions of section 226A of the CJA 2003 had been met, (noting the aggravating factors and the history of violent offences in each case). So, applying Smith and J (M), it was neither manifestly excessive, nor wrong in principle, nor an inappropriate exercise of discretion, to impose an extended sentence, despite the recall on licence of both accused in relation to other offending.

The appeals against the extended sentences were dismissed.

VULNERABLE PRISONERS: EFFECTIVE PARTICIPATION IN PAROLE PROCESS

R (EG) (by his litigation friend The Official Solicitor) v Parole Board and SSJ, QBD, [2020] EWHC 1457 (Admin)

This judicial review concerned the failure by the Parole Board to ensure a prisoner, who lacked capacity, was able to effectively participate in parole proceedings on his own behalf in the light of Rule 10(6) (b) of the new Parole Board Rules 2019, which allows the Board to appoint a legal representative where a prisoner lacks capacity.

The case included the intervention of both the Equality & Human Rights Commission and the Law Society of England & Wales. The Official Solicitor and the Lord Chancellor were also added as interested parties to the claim.

This case is important; the claim raised a wide range of issues but the judge decided it on a narrow basis.

Background

EG was serving an extended sentence and had been released on licence in 2013 but recalled in 2017. The new Rules were not in force when his case first came before the Board for it to consider his re-release. EG was initially unrepresented in the parole proceedings. The Board had, however, taken steps to ensure legal representation. The solicitor who took the case requested the appointment of a litigation friend. The Board refused to appoint one, believing it was not empowered to do so. The justice secretary then amended the rules to ensure such an appointment.

Both the parole proceedings and the resulting judicial review had a complicated procedural history. The parole proceedings were considerably delayed; at the time this judgment was giv-

en, the Board's review had yet to be completed.

The delays in completing the review were mainly due to:

a) EG's lack of capacity and inability to effectively participate in the process.

b) The solicitor acting on his behalf feeling unable to act in a dual capacity and requesting the appointment of a litigation friend;

c) the Board's stance that it was not empowered under the then Parole Board Rules to appoint a litigation friend, despite the SSJ's position that the Board were so empowered.

d) The Official Solicitor initially refusing to act as the claimant's litigation friend.

EG's Consolidated Grounds of challenge were as follows against both defendants:

i) an unlawful failure to provide a mechanism for prisoners without capacity to conduct their parole proceedings so that the prisoner could actively participate in the process;

ii) the failure to secure EG's participation in his parole review process;

iii) The unlawful failure to provide EG with a speedy review of his detention.

Detailed consideration was given to the parole review process, specifically the importance of holding an oral hearing that reflects a prisoner's legitimate interest to participate in the decision. It provides a prisoner with the opportunity to contribute, to put their case forward effectively and to test the views of those giving evidence against them.

EG argued that the defendants had a duty under the Equality Act 2010 to make reasonable adjustments to enable his participation, and to consider detriment arising from his protected characteristic. The relief sought was an order requiring the defendants to identify and provide a mechanism so that EG could participate.

The defendants had argued that EG's solicitor could act in a dual capacity. However, the solicitor declined on the basis that it would amount to him giving his own instructions and was therefore contrary to the Solicitors Regulation Authority Code of Conduct and unethical.

Considerable consideration was given to the proceedings at Mental Health Tribunals (MHT), where solicitors can act in a dual capacity. The MHT and parole review process were distinguished on the basis that the MHT had a substantial accreditation scheme that must be completed before a solicitor can receive public funds to represent a patient.

The judge declined to make any findings on certain wider issues, namely any public sector duty under section 149 of the Equalities Act 2010 and also any determination on process for prisoners without capacity generally. As a consequence, the judge limited her determination to: (i) the case as pleaded in the EG's Consolidated Grounds, as opposed to being drawn into any wider and extended issues raised by the parties' counsel (and counsel for the intervenors and interested parties) during their oral submissions; and (ii) the issues only to the extent that they related to the EG's case. The judge decided that wider and extended public policy issues would need to be considered separately after rigorous identification and pleadings, otherwise there was a risk that there would be unfairness to the other parties and also to the wider public interest.

HELD

The judge held that grounds 1 and 2 turned on the proper meaning and effect of Rule 10(6) (b) of the Parole Board Rules, in particular, whether this Rule entitled the Board to appoint a litigation friend and thereby facilitate EG's effective participation.

The judge found that, whilst the relevant wording of the Parole Board Rules was not very clear, the Rules must, and do, permit the Board to appoint a litigation friend where one is needed, as in these circumstances. The judge gave consideration to the drafting of the Rules and the intention behind the drafting to give the Board as much flexibility as possible. Further consideration was given to section 3(1) of the HRA 1998, which provides that legislation should, so far as it is possible, be read and given effect which is compatible with the ECHR.

The judge found that the lack of an equivalent accreditation scheme to that of the MHT in the parole review process meant that EG's solicitor could not act in a dual capacity. Therefore a litigation friend was needed and the Board was empowered to appoint a litigation friend. However, it was not for the Board to find a litigation friend. In the absence of a person being found, the judge felt the default would be for the Official Solicitor to act as the litigation friend. It was noted that the Official Solicitor had now agreed to act as the litigation friend in this case. The judge stopped short of giving directions to the Lord Chancellor but noted that the Official Solicitor could be required to act as litigation friend by direction of the Lord Chancellor (which it declined to do). Nevertheless, given the lack of any suitable family or friend, the judge found that the EG required the Official Solicitor to act for him if his parole review was to progress.

The judge held that there had been an unlawful delay in the parole proceedings in breach of the requirement under ECHR Article 5(4) for a timely review. The delays had been caused by the Board's mistaken belief that it could not appoint a litigation friend and that the solicitor could act in a 'dual role.'

RETROSPECTIVE CHANGES TO SENTENCE: EARLY RELEASE

R (Khan) v SSJ [2020] EWHC 2084 (Admin)

This case concerns a challenge to the provisions of the Terrorist Offenders (Restriction of Early Release) Act 2020 (TORERA 2020) which allows retrospective changes to release provisions.

Background

On 8 March 2018, Mohammed Zahir Khan had pleaded guilty to five counts of encouraging terrorism, contrary to s1(2) of the Terrorism Act 2006, one count of dissemination of a terrorist publication, contrary to s2(1) of the 2006 Act and two counts of stirring up religious hatred contrary to s29C of the Public Order Act 1986.

In May 2018, Mr Khan was sentenced to a determinate sentence of four years and six months. His automatic release from prison at the halfway point was scheduled for 1 March 2020. On 26 February 2020, the TORERA came into force. This introduced s247A of the CJA 2003. It required all 'fixed term' prisoners convicted of specified offences under the terrorism legislation to serve two-thirds of their sentence before being considered for release, and that their release would be subject to an assessment of risk by the Parole Board. As a result, both current and future prisoners convicted of one of the offences specified would no longer be automatically released half way through their sentences.

The change affected Mr Khan's sentence; instead of being released without reference to the Parole Board on 1 March 2020, his case was to be referred to the Parole Board on 30 November 2020, at the two-thirds point of his sentence. The Parole Board would then consider whether it was no longer necessary for him to remain in custody for the protection of the public.

Mr Khan argued that the 2020 Act is incompatible with Articles 5, 7 and 14 of the ECHR and applied for judicial review.

HELD

In respect of Article 14, the court agreed with the SSJ, who had said that distinctions based on the nature and gravity of the crimes committed do not fall within 'other status' and that the 2020 Act only applies to those convicted of terrorism offences and signifies the seriousness of those crimes. The court found that due to the real and immediate threat to public safety, demonstrated by the attacks in November 2019 and February 2020, it was rational for Parliament to distinguish terrorist offenders from other offenders, differentiate between terrorist offences and increase the time required before prisoners become eligible for release. Accordingly, the complaint under Article 14 was rejected.

In respect of Article 7, the court considered the Grand Chamber decision in Del Rio Prada v Spain (2014) 58 EHRR 37 and noted that the fundamental question would be what a 'penalty' is. The court concluded that the changes implemented by the 2020 Act related to early release, not to the sentence imposed by the judge. As such, an amendment by the legislature to the arrangements for early release did not amount to the imposition of a heavier penalty and so did not raise an issue under Article 7.

In respect of Article 5, the court considered Del Rio Prada v Spain again and determined that there is a distinction between the sentence passed by a sentencing judge and the administration or execution of the sentence. As such, throughout the prisoner's time in custody, the governing authority for that detention is the original sentence. The court found that it is foreseeable that arrangements for the execution of any given sentence might be changed by policy or legislation and, as such, the 2020 Act did not undermine the lawfulness of his sentence

The court rejected the claim and dismissed the application.

PAROLE BOARD: PROCEDURAL UNFAIRNESS (RECONSIDERATION MECHANISM)

R (Steven Stokes) v Parole Board [2020] EWHC 1885

This case concerns an application by Mr Stokes to judicially review the Parole Board's refusal to reconsider its decision on the grounds of procedural unfairness.

Background

The reconsideration mechanism was brought into force under the new Parole Board Rules in July 2019. It allows a prisoner and the SSJ the opportunity to apply to the Parole Board for a decision to be reconsidered if they believe it was either irrational and/or procedurally unfair. The reconsideration mechanism applies to all decisions relating to the release of prisoners serving an indeterminate sentence (life or IPP) and certain determinate sentences.

Mr Stokes was sentenced in 1979 to life imprisonment with a tariff of 15 years. The tariff expired in 1994. He was released on licence for the first time in 2005 but was recalled 5 months later,

having been arrested on suspicion of attempted murder. He was released on licence again in 2017 but there were ongoing concerns about his behaviour, including his association with sex workers and registered sex offenders and accessing sex websites. In 2018 he was returned to custody.

An oral hearing took place in July 2019 to consider the re-release of Mr Stokes. The panel heard from evidence from three psychologists, Mr Stokes' offender supervisor and his offender manager. Each of the professionals recommended release on licence. However, the panel refused to direct his release. Despite acknowledging that the proposed risk management plan was very robust, the panel doubted it would be effective in managing Mr Stokes' risk as it was similar to previous risk management plans. The panel set out various concerns. These included Mr Stokes putting himself into risky situations, lacking internal controls to manage his risk and being dependant on external controls. It considered that these concerns outweighed the recommendations of all the witnesses.

Mr Stokes applied for reconsideration of this decision under Parole Board Rule 28. This application was refused. Mr Stokes argued that this refusal did not recognise that the original panel failed to give adequate reasons for not accepting the recommendation of all five professional witnesses and also failed to deal with concerns expressed by his offender supervisor that open conditions would not offer him the level of support he needed. The decision refusing reconsideration did not adequately deal with the procedural unfairness challenge

HELD

The judge held that it was clear that the panel's reasoning rested on Mr Stokes' behaviour in the two recent periods of release on licence. However, there had been significant developments since the last recall, including work with a psychologist and an occupational therapist and a change in Mr Stokes' presentation. The professionals had expressed concerns that the level of support needed would not be available in open conditions. None of these factors were expressly or implicitly put into the decision-making balance by the panel. The judge concluded that the reasoning of the panel as to why the risks posed by Mr Stokes could not be managed adequately in the community fell below the acceptable standard in public law. As a result, so too did the reasoning in the reconsideration decision.

The judge agreed that although the decision summarised the procedural unfairness grounds this was lost sight of when the conclusion was formulated. Case law had established that while there is no common-law duty to give reasons, fairness in some circumstances may require this even where statute does not impose an express duty to give reasons (Dover District Council v CPRE Kent). The courts have emphasised the importance of adequate reasons in the decisions of the Parole Board where the liberty of the subject is at stake. The duty is heightened when the panel rejects expert evidence (R (Wells v Parole Board).

Overall the judge concluded that these were significant failings and the reconsideration decision was quashed and ordered to take place again.

PAROLE BOARD: PROCEDURAL UNFAIRNESS

R (Grinham) v Parole Board [2020] EWHC 2140 (Admin)

The case concerned an application for judicial review of a Parole Board decision not to direct re-release on licence of a determinate sentence prisoner after recall on the grounds of procedural un-

fairness including a rushed hearing and the late service of relevant reports.

Background

Mr Grinham was convicted of burglary (domestic and commercial), attempted burglary, harassment, perverting the course of justice, and driving offences. The burglary offences were committed in order to fund his use of class A drugs. He received a determinate sentence of 56 months. He was released at the half-way point but recalled after relapsing into drug use.

Mr Grinham applied for re-release and was granted an oral hearing by the Parole Board. After deterioration in his health, an expedited hearing was granted. By the time of the hearing both his offender manager and offender supervisor supported his re-release on licence.

The expedited hearing was listed for only two hours rather than the expected full day and conducted by a single member of the Board, who could not stay beyond the time allotted for the case. Furthermore, relevant reports had been served late (on the morning of the hearing) on which instructions needed to be taken before the hearing. An adjournment was discussed, which upset Mr Grinham. However, the hearing went ahead but evidence had to be given in stressful conditions. Furthermore, a key report was not served until after the hearing.

The panel did not direct re-release, despite the support by the professional witnesses. It concluded that the proposed risk management plan was not likely to be effective to contain Mr Grinham's risk to the community

HELD

The court found that there had been serious failings in the preparation of the case for the oral hearing. This had resulted in real difficulty for Mr Grinham and his solicitor on the day of the hearing. These failings had had an impact on the fairness of the hearing.

In summary the court found:

- There was a failure to comply with directions to serve reports before the hearing;
- There was insufficient time before the hearing for Mr Grinham's solicitor to take instructions on the late served reports;
- The Chair had limited time to hear the case which result in an unreasonable pressure of time that impacted on the evidence received;
- The limited time available had a prejudicial effect on Mr Grinham's giving evidence;
- Mr Grinham's solicitor had been unable to challenge witnesses as extensively as she would have like, materially this meant that licence conditions were not fully explored with the offender manager
- The service of the report after the hearing meant oral closing submissions could not be made on the day to allay any concerns in relation to its contents.

The court said that once procedural unfairness has been established, it is enough to show that but for that procedural fairness the outcome might have been different. It is not necessary that the outcome would necessarily have been different. The court decided that it was impossible to conclude that the Board would inevitably have come to the same decision. For these reasons, the court held the hearing was unfair and the resulting decision was unlawful. The decision was quashed and an order was made for an expedited re-hearing to be listed.

PAROLE BOARD: PROCEDURAL UNFAIRNESS - TRANSFER TO OPEN CONDITIONS

R (Stephens) v Parole Board [2020] EWHC 1486 (Admin)

This case concerned a challenge by a prisoner serving a mandatory life sentence against the Parole Board's decision at a pre-tariff review not to recommend his transfer to open conditions.

Background

Mr Stephens had been convicted of murder (when he was 20), and sentenced to life with a tariff of 17 years. His case was referred to the Parole Board for a pre-tariff review to consider whether his risk was low enough for him to be moved to open conditions. The Parole Board considered his case but did not recommend a transfer.

Mr Stephens claimed that the Board had failed to consider all of the factors required by law, and had failed in its duty of inquiry amounting to procedural unfairness.

The SSJ provides that the main factors which the Parole Board must take into account when evaluating the risks of transfer to open conditions against the benefits:

1) the extent to which the prisoner has made sufficient progress in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where the prisoner in open conditions may be in the community unsupervised on licensed temporary release

2) the extent to which the prisoner is likely to comply with the conditions of any such form of temporary release

3) the extent to which the prisoner is considered trustworthy enough not to abscond

4) the extent to which the prisoner is likely to derive benefit from being able to address areas of concern and be tested in open conditions such as to suggest transfer to open prison is worthwhile at that state.'

Mr Stephens argued the Board had only considered the first three factors.

HELD

The court said it could not see any consideration of the matters to be addressed under factors two and four of the guidance. The concluding paragraph in the Board's decision letter focussed mainly on risk reduction. It found the panel erred in law in not in not according with the guidance set out in the authorities such as R (Grantham) v Parole Board for England and Wales [2019] EWHC 116 (Admin) and also R (Hutt) v The Parole Board [2018] EWHC 141 (Admin) as regards the necessity to consider all of the relevant factors which the Board is required to address.

The court made a declaration that the decision was unlawful, and made an order quashing that decision. Although Mr Stephens had also requested a mandatory order that his case be expedited, the court considered that due to the Covid-19 pandemic it could not ascertain the Board's ability to expedite hearings, and therefore expressed strong encouragement for expedition of his case rather than making an order.

PAROLE BOARD: TRANSFER TO OPEN - FAILURE TO FOLLOW DIRECTIONS

R (Debono) v Parole Board [2020] EWHC 655 (Admin)

This case involved a challenge to a Parole Board decision not to direct release or to recommend transfer to open conditions on the grounds that the Board had failed to comply with the correct test set out in Directions issued by the SSJ.

Background

In December 2006, Mr Debono was convicted of two offences of arson with intent to endanger life. These involved fire-bombing the homes of two police officers in the early hours of the morning when the officers and their families, including small children, were at home. He was sentenced to two concurrent sentences of imprisonment for public protection (IPP). The tariff was eight and a half years, less 323 days spent on remand. The tariff had expired more than five years before, in October 2014.

In 2018 Mr Debono's case was reviewed by the Parole Board. The Board had before it a range of reports to consider including from a number of psychologists, his offender supervisor and his offender manager. Mr Debono had a history of previous offences, including many convictions for offences of dishonesty, some for violence, and many involving vehicles. However, while in custody, he had engaged in a range of rehabilitative programmes and it was accepted his behaviour in custody was 'excellent'. The psychological reports indicated that he had dysfunctional personality traits and other unaddressed risk factors that were inhibiting his progress. The offender supervisor recommended a transfer to open conditions but accepted that Mr Debono had not fully addressed his core risk factors. The offender manager recommended that Mr Debono remain in closed conditions.

The Parole Board did not direct release; it was not satisfied that Mr Debono had reduced his level of risk such that it could be managed in the community release. It also did it recommend his transfer to open conditions; it found he had unmet treatment needs that could not be addressed in open conditions.

Mr Debono applied for judicial review. He claimed that the Parole Board had failed to consider Paragraph 7 of the 2015 Directions, pursuant to the CJA 2003 Pt 12 s.239, and/or the balancing exercise which is to be carried out when deciding whether or not to recommend transfer to open conditions. The balancing of the risks and benefits involves consideration of the following factors:

1) the extent to which a prisoner had made sufficient progress in addressing and reducing risk;

2) the extent to which the prisoner was likely to comply with the condition of any form of temporary release;

3) the extent to which the prisoner was trustworthy enough not to abscond; and

4) The extent to which the prisoner was likely to derive benefit from being tested in an open environment.

Mr Debono submitted that the Board did not appear to have considered the benefits of transfer to an open prison. This included Mr Debono being able to demonstrate that he could i) resolve conflict without resorting to violence, ii) resist the temptation to abuse drugs, iii) obtain employment and (iv) enhance his personal support network without resorting to previous antisocial associates.

HELD

It was held to be unclear whether the benefits of being tested in an open environment had been adequately considered by the Parole Board. Even if the benefits had been considered, the Board's decision did not provide evidence that it had conducted the appropriate balancing exercise, weighing the benefits against the risks. Since the balancing exercise was held to be fundamental to the decision-making progress, the court quashed the decision and ordered a fresh parole review.

R (Samuel) v Parole Board [2020] EWHC 42

This case also involved a challenge to a refusal by a Parole Board decision not to direct release or to recommend transfer to open conditions on the grounds that the Board had failed to comply with the correct test set out in Directions issued by the SSJ as well as findings of fact not based on evidence

Background

Mr Samuel pleaded guilty to a number of offences including s18, ABH and robbery. He was sentenced in 2006, when he was aged 17, to detention for public protection. The tariff was five years. He appeared before the Parole Board in February 2019, by which point he was substantially beyond tariff. There were no recommendations from professionals for release but all recommended a transfer to open conditions. Mr Samuel sought a judicial review of the decision of the Parole Board not to direct his release or recommend his transfer to open conditions.

There were two grounds of challenge:

Ground 1 - failure to apply the correct test

The SSJ has issued directions under s239 (6) of the CJA 2003 relating to the transfer of indeterminate-sentence prisoners to open conditions. The directions state that:

> 'A move to open conditions should be based on a balanced assessment of risk and benefits. However, the Parole Board's emphasis should be on the risk reduction aspect and, in particular, on the need for the ISP to have made significant progress in changing his/her attitudes and tackling behavioural problems in closed conditions, without which a move to open conditions will not generally be considered.'

The direction sets out the main factors the Parole Board should take into account when evaluating the risks of transfer against the benefits and case law emphasised that the Board is required to undertake a balancing exercise between risk and benefit when assessing suitability for transfer to open conditions.

Ground 2 - findings of fact not based on the evidence

Mr Samuel argued that there were a number of findings not substantiated by the evidence. One of the Board's findings was that the professional witnesses were recommending transfer to open conditions not on the basis that Mr Samuel had reduced his risk to an acceptable level but because there was an impasse and he was stuck in the system.

HELD

Ground 1: The judge held that the Board had failed to carry out a balancing exercise. There clearly were benefits to Mr Samuel of a transfer to open conditions, set out in the dossier. These included the opportunity of furthering his education with a local university, devel-

opment of further community ties including with his family, and the potential for the move to act as a catalyst in increasing motivation to engage with his sentence plan. There was no mention in the Board's decision of any of the benefits let alone an evaluation of them or a weighing of them in the balance - this was an error in law. If the Board was of the view that there were no benefits it should have said so expressly and explained its reasons for doing so.

Even though the Board considered that the risk level posed by Mr Samuel remained high it was not possible for judge to conclude that it was 'highly likely' that it would have reached the same outcome even if it had considered and evaluated the benefits. Ground 1 succeeded.

Ground 2 The judge held that the Board's interpretation of the professional witnesses did not reflect the full position articulated by them. They did refer to an 'impasse' but also said that a move to open conditions would have benefits, and that Mr Samuel's risk levels were such that they could be managed in open conditions. The Board had taken a narrow view of what the professional witnesses were saying, and misunderstood that evidence before it. This amounted to an error of law. Ground 2 succeeded.

The Parole Board's decision was quashed. The decision of whether the Parole Board should recommend Mr Samuel's transfer to open condition was remitted to a freshly constituted panel.

Mr Samuel was awarded his costs in connection with his application for specific disclosures of the note of the evidence taken by the panel. Mr Samuel also applied for his costs in connection with his application to rely on further evidence. Case law has established the general principle that costs could not be awarded to successful parties where the Parole Board has adopted a neutral position. The costs application in relation to the further evidence did not justify a departure from that ordinary rule and the costs for that application were refused.

PAROLE BOARD: FAILURE TO DIRECT ORAL HEARING

R (Bennett) v Parole Board [2019] EWHC 2746

The case concerned an application for judicial review of a Parole Board decision not to hold an oral hearing on the grounds that the decision was unfair under common law and Article 5(4) of the ECHR.

Background

Mr Bennett was convicted in October 2017 of an offence of assault occasioning actual bodily harm. He was given to a determinate sentence of 26 months. In October 2018, he was released on licence. His licence was revoked in November 2018 and he was recalled to prison on the grounds that he had breached his curfew, had a physical altercation with another resident at his accommodation and failed an alcohol test.

A post-recall report stated that there was a high probability that Mr Bennett would re-offend if released and concluded that he was unstable both in the community and in custody. It also said that he was overly paranoid, experienced frequent suicidal ideations and required formal assessment by a psychologist.

In January 2019, the Board considered his case and decided not to grant an oral hearing. Mr Bennett then submitted that the revocation of his licence had not met the test for recall; that he mainly presented a risk of self-harm rather than serious harm to the public, and that an

oral hearing would help to explore ways to resolve difficulties he had been experiencing.

The Board rejected these submissions, and in February 2019 confirmed its decision

HELD

The court held that the Board's refusal to grant an oral hearing was unfair and breached the prisoner's rights under the common law and Article 5(4) of ECHR, and the decision was quashed.

The court followed the judgement in Osborn, Booth and Reilly (2013) UKSC61 which set out the principles for approaching the decision about whether to grant an oral hearing:

- The Board should grant oral hearings when fairness to the prisoner requires a hearing in the light of the facts of the case;
- The Board should consider whether its independent assessment of risk may benefit from a closer examination provided by an oral hearing;
- The question whether fairness requires a prisoner to be granted an oral hearing is different from the question of whether that prisoner has a likelihood of being released or transferred to open conditions;
- Paper decisions made by single member panels of the Board are provisional, and a prisoner does not need to justify that a decision was incorrect, just to persuade the Board that an oral hearing is appropriate;
- When in doubt, the Board should allow prisoners an oral hearing.

The court found that in this case, Mr Bennett had well-recorded mental difficulties, and it would have required an oral hearing to properly understand his behaviour and fairly assess the risks he posed to himself and to others. It considered that the Board could not have fairly made an independent assessment of risk without all the information provided at an oral hearing.

It was noted by the court that although Mr Bennett was not disputing matters relating to his recall, his submissions included potential explanations and mitigating factors with respect to his behaviour, which ought to have been heard and considered at an oral hearing.

Accordingly, the court concluded that this was clearly a case which was not appropriate to be determined by a paper decision, and directed an oral hearing was required.

R (Tarnowski) v Parole Board [2019] EWHC 2674 Admin

The case concerned an application for judicial review of the decision of the Parole Board not to direct an oral hearing on the grounds of procedural unfairness.

Background

On February 2016 Mr Tarnowski (then aged 20) was given an extended sentence of six years with an extended licence period of six years following his guilty plea to offences of sexual activity with a child. He was eligible for release from 23 January 2019. A single member of the Parole Board considered his case on the papers and refused to direct release. Further representations by his solicitor were made requesting an oral hearing. A duty member of the Board considered the case and found that the panel had been in possession of sufficient information to conclude there was no need for an oral hearing; the 'correct' test had been applied and the principles of Osborn, Booth and Reilly (2013) UKSC61 had been considered. In ponse, a pre-action letter was issued by Mr Tarnowski challenging the decision

to refuse an oral hearing on the grounds of procedural unfairness.

The court considered the guidance given in Osborn in which the correct approach to (common law) procedural fairness had been considered and the factors which should be taken into account when considering whether to hold an oral hearing. Osborn also noted that the standard of procedural fairness under the ECHR reflected those under the common law and that 'it will in most cases be necessary as a matter of fairness that he should have the opportunity to appear in person before the board'.

The court referred to the Parole Board's Member Case Assessment Guidance which noted that (a) 'fairness to the prisoner is the overriding requirement and the perceived utility of an oral hearing is not the deciding factor'; and (b) in order for a prisoner to justify the holding of an oral hearing it only needs to show that an oral hearing is appropriate.

HELD

The court found that the decision to refuse an oral hearing was procedurally unfair. The decision was quashed and the court directed that the Parole Board reconsider the application for an oral hearing.

In reaching its decision the court accepted Mr Tarnowski's argument that no 'real reasons' had been given for refusing the oral hearing and it had not involved an explanation as to why procedural fairness did not imply that there should be an oral hearing.

The court noted that the test is not whether an oral hearing would be worthwhile, the test is one of fairness. It found that the refusal to allow Mr Tarnowski the opportunity to make oral representations was likely to be damaging to his rehabilitation. In this particular case Mr Tarnowski was imprisoned on 23 January 2015 when he was 18 and, in order to fairly assess the extent of development made whilst in prison, it was necessary to see a prisoner in person. A prisoner should be given the opportunity to given his own evidence in relation to his progress during his period of imprisonment.

R (Welsh) v SSJ [2019] EWHC 2238 (Admin)

The case concerned an application for judicial review of the Parole Board's decision not to allow an oral hearing.

Background

Mr Welsh was convicted of armed robbery in 2006; he received an IPP sentence with a minimum term of two years. He was released in February 2014 but recalled twice, in May 2015 and in March 2018. On the second instance, he was found to have an air rifle in his possession, and was subsequently convicted of a firearms offence and given a determinate sentence which was completed in April 2019.

In September 2018, Mr Welsh's case was reviewed by the Parole Board on the papers. The MCA Duty member found his risk to the public was too high to direct his re-release on licence. Mr Welsh's solicitors then made a further submission requesting an oral hearing. This was refused. The Board said that nothing in the submission persuaded it that the MCA decision had not been entirely reasonable and appropriate

Mr Welsh applied for judicial review of the decision

HELD

The court held that there had been an incorrect application of law by the Parole Board in rejecting the request foran oral hearing. It had erroneously treated the application for an oral hearing as if it had been an application to appeal or

review the previous decision of the MCA duty member, which was only meant to be preliminary. When considering whether an oral hearing should be granted, the Board should consider whether it was fair, based on the factual circumstances, for the prisoner to have an oral hearing. The court said the Board should have considered in particular the need to avoid a sense of injustice for prisoners and this entails allowing them to participate in the procedure for considering release. The court referred to the case of Osborn and Booth v Parole Board [2014] AC 1115. It held that Osborn shows that there is, in effect, a presumption in favour of an oral hearing in circumstances such as in this case where there was nothing in this case to displace that presumption. It held that to the contrary, there were a number of indicators that an oral hearing, in fairness, was required. The decision was also procedurally unfair.

The court quashed the decision and ordered that an oral hearing take place.

R (Black) v Parole Board [2020] EWHC 265 (Admin)

The case concerned an application for judicial review of the Parole Board's decision not to grant an oral hearing of an application for release on life licence by an over-tariff indeterminate prisoner with a short tariff.

Background

In 2006 Mr Black was sentenced to an indeterminate sentence for public protection in respect of an offence of sexual assault, with a tariff of six months.

On 13 March 2019, the Board considered Mr Black's case on the papers. It did not recommend his release nor grant him an oral hearing. The extensive reasons given for by the Board for this decision included the following (which it also considered did not make an oral hearing necessary): (i) there had been an oral hearing in April 2018 which Mr Black had refused to attend; (ii) he had an extensive criminal record, including sexual and violent offences; (iii) he had refused to engage in work to address his offending behaviour; (iv) there were significant outstanding sentence planning targets and Mr Black had little intention of working with professionals to address the risk of re-offending.

Mr Black had made extensive representations in a letter of 3 April 2019 submitting that an oral hearing was required, particularly on the basis that there were inaccuracies in the dossier of documents provided to the Board. In his subsequent claim, Mr Black also argued that the panel wrongly took into account a psychology report and that his character was good and he was a model prisoner.

The court hearing the case referred to the leading case of Osborn, Booth and Reilly (2013) UKSC61 in which the Supreme Court had considered that an oral hearing for parole would generally be necessary where (i) important facts were in dispute or significant mitigations offered which needed to be heard orally to determine their credibility; (ii) the Board could not otherwise make an independent risk assessment; (iii) a face to face encounter was necessary for the prisoner's case to be put effectively or tested; (iv) the question of fairness for whether an oral hearing was necessary was different to whether the application would succeed and could not be answered by assessing the likelihood of the latter; and (v) in the case of post-tariff indeterminate sentence prisoners, the Board was to scrutinise ever more anxiously any decision.

HELD

The court found that the Board's decision not to grant an oral hearing was flawed. It found that the starting point was that Mr Black's short tariff had expired more than a decade ago and yet he was still in prison. His case should therefore be anxiously scrutinised per point (v) of Osborn above. Additionally, there were issues of fact in dispute, which required testing at an oral hearing.

The court quashed the Parole Board decision

PAROLE BOARD: INADEQUATE REASONS

R (PL) v Parole Board and SSJ [2019] EWHC 3306

This case involved a challenge to a Parole Board decision to recommend transfer to open conditions against the recommendations of professionals and for providing inadequate reasons.

Background

PL was convicted in 2009 of a series of offences, which included actual bodily harm, common assault against women and possession of indecent images. He was given an extended sentence of 10 years, which was later quashed by the Court of Appeal and replaced with a sentence of imprisonment for public protection (IPP).

PL had a history of self-harm and was diagnosed with a personality and anxiety disorder. He displayed signs of a sociopath; he had an urge to kill adults, sadistic tendencies, was cruel to animals and fascinated by serial killers. He was assessed as a significant risk to the public. However, from 2014, his behaviour had improved following psychological help.

In 2018, the Parole Board heard PL's case. This included listening to recordings of telephone calls between PL and his father. Psychologists and PL's offender managers recommended that he be released to a psychologically-informed planned environment (PIPE) AP, or alternatively to his family. They agreed that open prison conditions would be bad for his psychological health. However, the Parole Board declined to direct release but recommended transfer to open conditions.

PL applied for judicial review. He argued that the Parole Board had ignored the professionals' recommendations and that his personality disorder would mean that open conditions would have a negative impact on him. He claimed too much weight had been given to the content of the telephone calls and his dependency on drugs and alcohol, which was not relevant to his case.

HELD

The court said that PL's previous offences were extremely concerning as was his custodial behaviour and it was loath to interfere with the panel's decision. The panel had considered the view of the professionals, and it was permitted to take a different view. Even so, the court found that the panel had misunderstood or had not fully grasped PL's personality disorder and how open conditions might have a negative impact on him. If the telephone calls had had a significant influence on the panel's decision, the panel should have explained this fully. The panel had also relied on the use of alcohol and drugs as a reason to recommend open conditions, in order to test PL's resolve, even though, according to PL's history, alcohol and drugs were not major risk factors, especially as PL had had a clean drug test result recently. Therefore, these factors should not have swayed the panel's decision.

On this basis, it was held that the panel's decision was flawed. While PL was in closed conditions, it could not be predicted how PL would behave in open conditions.

The application was granted. The panel's decision was quashed.

PAROLE BOARD: MATERIAL MISTAKE OF FACT IN DECISION TO RELEASE

R (Shepherd) v Parole Board [2019] EWHC 3256 (Admin)

This case concerned an application for judicial review of the Parole Board's decision not to direct a prisoner's release from prison on the basis of a material mistake of fact made by the Board.

Background

In March 2006, Mr Shepherd was convicted of attempted kidnap and was given an IPP sentence. In May 2017, he was released from prison on licence.

Mr Shepherd formed a relationship with a woman whom he had met in the Ipswich area. In May 2018, police received a complaint from a woman in the Ipswich area relating to three incidents which occurred while she was walking home from work in April and early May 2018. On each occasion she recalled being approached by a man driving a 'dark coloured' car the size of a typical BMW. On the third occasion, the woman made a note of the registration number DV03 YRY. This vehicle was later identified as being a BMW registered to Mr Shepherd's partner (Ms Smy) which she purchased on 10 May 2018.

Mr Shepherd was arrested on suspicion of stalking and interviewed by police. He accepted that he was the man who spoke to the complainant on the third occasion, but denied he was the person involved in the first and second incidents. The CPS declined to charge him; it found the alleged conduct did not meet the criminal threshold. However, he was recalled to prison on the basis of the allegations.

In November 2018, the Parole Board reviewed Mr Shepherd's case at an oral hearing. There was no audio recording and the only contemporaneous records were the handwritten notes of the panel Chair and Mr Shepherd's solicitor.

In December 2018, the Board issued a decision letter. It did not direct re-release. It found that Mr Shepherd had the risk profile of a stalker; it relied on the evidence in respect of the third incident and an alleged admission by Mr Shepherd, or his partner, that her previous car had been a BMW of a darkish colour. Mr Shepherd's solicitor's notes contradicted this assertion. These recorded that Mr Shepherd had said the previous car had been a 'light blue – two-tone BMW'. The Chair's handwritten notes contained no reference to this fact, but the Chair conceded on further questioning that Mr Shepherd had referred to a two-tone colour and 'may have made reference to a blue colour'.

Mr Shepherd applied for judicial review of the Board's decision on the basis of a material mistake of fact..

HELD

The court identified four requirements for a challenge of mistake of fact to succeed: (1) there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; (2) the fact or evidence must have been established, in the sense that it was uncontentious and objectively verifiable; (3) the claimant (or his/her advisors) must not have been responsible for the mistake; and (4) the mistake must have played a material (although not necessarily decisive) part in the decision

maker's reasoning.

On elements (1) and (2), the court found on the balance of probabilities that the Board had made a mistake of fact by wrongly citing an admission concerning the colour of his partner's previous car, which was objectively verifiable from his solicitor's notes from the hearing.

On element (3), the court found that it was clear that neither Mr Shepherd nor his solicitor could be held responsible for the mistake.

On element (4), the court could not rule out the possibility that the mistake of fact regarding the 'admission' did not play a material part in the Board's reasoning. This was because the conclusion about Mr Shepherd's risk to the community made specific reference to the alleged 'admission' that his partner's previous car had been a BMW 'of a darkish colour' which seemed to have provided the Board with the evidential basis for its conclusion that 'it was more likely than not that you were the driver on the first two occasions as well', which, in turn, appears to have supported the panel's conclusion that he had 'the risk profile of a stalker' (albeit there could have been other reasons for it to have taken that view).

The court quashed the decision and remitted the matter back to a freshly constituted panel for reconsideration. The court observed that the Board had now implemented a policy to digitally record every hearing, which should avoid difficulties such as these arising in the future.

CATEGORY A REVIEW – FAILURE TO GRANT AN ORAL HEARING

R (Conroy Smith) and the SSJ [2020] EWHC 2712 (Admin)

This case concerns an application for judicial review of the decision by the Category A Review Team (CART) to grant Mr Smith an oral hearing of his application to be downgraded from Category A to Category B

Background

Mr Smith was convicted of murder (which he denied) and sentenced to life imprisonment in 2006 with a 29 year and 14-day minimum term. He was a Category A prisoner. On 25 June 2019, the Local Advisory Panel (LAP) met to consider its recommendation to the Category A Release Team (CART) in respect of Mr Smith's security category. The LAP took into account the recommendations made by three expert psychologists who recommended he be downgraded to Category B. The LAP decided that the Mr Smith had done all that he could within high security conditions and could be managed as a Category B prisoner. It therefore recommended a downgrade to Category B.

However, the Director of the Long Term and High Security Estate refused to downgrade Mr Smith on the basis that there was insufficient evidence of risk reduction. The Director had taken into account the fact that two of the expert psychologists had recommended that Mr Smith should engage in the Identity Matters programme if he was downgraded (despite the third, Professor Crighton, having said that this programme was unnecessary due to questions regarding its effectiveness). The Director said that the Identity Matters programme could be carried out as a Category A prisoner. Further explanations were not provided.

On 25 September 2019 Mr Smith's solicitors submitted representations requesting an oral hearing, submitting that there was cogent evidence that Mr Smith no longer presented a significant risk of re-offending and noting in particular that PSI 08/2013 contemplates an

oral hearing where the LAP, in combination with an independent psychologist, suggest that a downgrade is justified.

The request for an oral hearing came before the CART on 15 October 2019. The CART refused to grant the request on the basis that the information in the psychologists' reports was sufficient for Mr Smith's risk assessment and no further oral representations were required. CART also confirmed that the Identity Matters programme could address the risk of reoffending, but did not address the fact that this could be carried out as a Category B prisoner or whether it was in fact effective.

Mr Smith applied for a judicial review of the CART's decision and an order quashing it.

HELD

The Judge found that an oral hearing was required for the following reasons:

1. To hear why the Director and CART rejected the recommendations of the three psychologists so Mr Smith could address the issues;

2. To explore why the Director/CART disagreed with the LAP about downgrading the security categorisation;

3. The fact that the psychologists all agreed on downgrading strengthened the argument for an oral hearing;

4. There was a dispute among the psychologists whether the Identity Matters course was necessary. If it was unnecessary, or unnecessary to complete the course as a Category A prisoner , then the case for downgrading gained strength;

5. Fairness required an oral hearing to fairly resolve whether the Identity Matters programme should be completed before downward categorisation could be considered;

6. Given Mr Smith's satisfactory completion of various programmes and psychological counselling sessions over eight years, it might make a difference for the Director to hear directly from him as to why there was now a significant reduction in the risk of his reoffending

7. Looking at the matter overall, it was unfair for the Director/ CART to make an adverse judgment against Mr Smith solely on an examination of the papers.

Mr Smith was entitled to have his case considered fairly on its own facts regardless of the fact that the index offence was murder.

The judge allowed the claim

R (Seton) v SSJ [2020] EWHC 1161 (Admin)

This case concerns an application for judicial review of the CART's refusal to grant Mr Seton an oral hearing of his application to be downgraded from Category A to Category B

Background

Mr Seton was a Category A prisoner. He had been convicted of murder in 2008 but maintains innocence. He is serving a mandatory life sentence. His tariff was set at 28 years and 214 days. It will expire in 2038. His security category was reviewed on 18 June 2019.

The LAP report recommended Mr Seton be downgraded to Category B, and expressly noted that he had significantly reduced his risk since arriving on the Psychologically Informed Planned Environment (PIPE) unit. However, two of the reports contained contrasting assessments of the risk Mr Seton posed. His offender manager assessed the risk

to the public as high but a psychologist said that Mr Seton had made sufficient progress to be downgraded although she said that it would be beneficial for him to continue his work on the PIPE unit in Category A.

Mr Seton's solicitors made representations to the CART that he be downgraded or, if CART disagreed, that there should be an oral hearing due to the disagreement in the reports. He had been Category A for 13 years and never had an oral hearing and his maintenance of innocence should not preclude either downgraded or being granted an oral hearing.

In July 2019, the CART issued its decision. It claimed there was insufficient evidence of a significant reduction in Mr Seton's risk of reoffending and that he should remain Category A. The decision did not give reasons to support the conclusion that there are no grounds justifying an oral hearing. Mr Seton applied for judicial review. He argued that the relevant policy document, PSI 08/2013, required reasons to be given for rejecting an oral hearing and that the decision breached procedural unfairness. In response the SSJ argued there was no difference of opinion between the report writers and so there was nothing to be gained by an oral hearing.

HELD

The court held that, despite significant difference in views between experts, it was often unnecessary for CART to hold an oral hearing to discuss their views. However, the case had to be considered on its own facts. The sole factor in play in this case was the difference on an important and central issue to the decision to be made, namely whether there had been a sufficient reduction in risk to allow a downgrade.

The court was concerned as to whether the further work undertaken by Mr Seton after completion of the reports would affect the risk assessments, in particular that of the offender manager. Whilst a lapse in time is inevitable between the preparation of the various reports and the CART review, in this case, because of Mr Seton's further work, there had to be further enquiry before CART could make its judgment as to the risk of Mr Seton.

The judge noted that the PSI contemplates that it may be possible to have a short hearing targeted at the really significant points in issue. The judge held there should have been a short oral hearing targeted at any change in risk assessment as a result of the further individualised work and the further time spent by Mr Seton on the PIPE unit. These factors could have reduced Mr Seton's risk and therefore it was a significant issue at hand, specifically where two experts have such contrasting views. It would also enable CART to have direct contact with Mr Seton or those who have direct contact with Mr Seton.

The judge found that on the particular facts of this case, it was wrong for the Director to make a decision without a short hearing targeted specifically to that issue. It held that there should have been a short oral hearing to discuss specifically this issue. The decision not to hold an oral hearing had been wrong and unlawful.

LAWFULNESS OF THE RECONSIDERATION MECHANISM

R (Huxtable) v Parole Board & SSJ [2020] EWHC 2494 (Admin)

This case was an unsuccessful application for judicial review of the reconsideration mechanism brought in under the new Parole Board Rules 2019. Rule 28 provides that the Board's decisions to release prisoners will be provisional for 21 days, thus delaying release, to allow

time for applications to the Board, either by a prisoner or the SSJ for the decision to be reviewed. Such applications can only be made on the grounds that the decision is irrational or procedurally wrong.

Background

Mr Huxtable had received an IPP sentence in 2008. The minimum term was two years and 245 days. The Parole Board reviewed his case in August 2019 and directed his release. In line with Rule 28, he was then held for 21 days until the provisional decision became final to allow time for an application for the decision to be reviewed. In October 2019, after his release, Mr Huxtable applied for judicial review of the reconsideration mechanism, disputing the fairness of the 21-day provisional period and the delay this caused to his release date. The challenge was to the lawfulness of the Reconsideration Mechanism itself, as well as the specific way in which it had been operated in his individual case.

Mr Huxtable argued that the reconsideration procedure is unlawful for two reasons. First, in introducing the mechanism and the 21-day provisional period, the SSJ had used powers that permit the making of procedural rules to make substantive amendments to the powers of the Parole Board. Mr Huxtable claimed that this was ultra vires (outside of the law) as it violated the CJA 2003. Second, he claimed that the 2019 rules breached Articles 5(1) and 5(4) of the ECHR, the right to liberty and security. This was because the rules permit the SSJ to detain indeterminate sentence prisoners even when the Parole Board has decided they no longer pose a large enough risk to be imprisoned – it adds delay to a prisoner's release that is unjustified by the facts and circumstances of their individual case and could for instance lead to the loss of a place at an Approved Premises.

There was some discussion about Rule 9 of the 2019 Rules, which provides a general power to alter any normal time limit, including an abbreviation of the usual 21-day period for reconsideration decisions. An application to the Board for such an alteration can be made by a prisoner or the SSJ. The discussion included in what circumstances that discretion would be exercised. The SSJ told the court that it is likely that there would be a 'very limited number of cases', when detaining a prisoner for the full 21-day period would impede that prisoner's release plan.

HELD

It was held that the provisional status of a Parole Board decision for 21 days is not ultra vires (outside of the law), nor does it violate Article 5. The two-step process, comprising the provisional decision and the finalisation of that decision, was necessary to ensure that the correct decision was taken. The introduction of a short provisional period did not mean that the decision was being taken by an entity other than the Parole Board, or that the powers of the Parole Board had been altered.

Article 5 was not breached. The 21-day provisional period was justified on the grounds of risk, to ensure that the Parole Board's decision was rational and procedurally fair. As the 21-day period could be reduced by the Parole Board under Rule 9, in certain cases upon an application by the prisoner, the 2019 rules were not an unfair blanket policy and could be tailored to individual cases.

The application was refused.

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