IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

2018 EWHC 141 (Admin)

CO/4070/2017

Royal Courts of Justice

Wednesday, 17th January 2018

Before:

HIS HONOUR JUDGE DIGHT CBE

(Sitting as a Judge of the High Court)

B E T W E E N :

THE QUEEN

ON THE APPLICATION OF

HUTT — Claimant

- and -

PAROLE BOARD OF ENGLAND AND WALES — Defendant

J U D G M E N T

APPEARANCES

MS R EARIS (instructed by Lansbury Worthington) appeared on behalf of the Claimant.

THE DEFENDANT did not attend and was not represented.

JUDGE DIGHT:

1 This is a challenge to the decision of the Parole Board made on 2nd June 2017 by which it declined either to direct the applicant's release from custody or recommend his transfer to open conditions. The applicant asks that the decision be quashed and that the matter be remitted to a differently constituted panel so that the decision can be considered afresh insofar as the refusal to recommend transfer to open conditions is concerned, permission to bring the challenge having been granted by Mr Peter Marquand on paper on 3rd October 2017.

2 Mr Marquand limited permission to the applicant's third ground of challenge relating to the refusal to recommend transfer to open conditions, on the grounds that the Parole Board had failed to carry out the required balancing exercise when considering whether to move the applicant to open conditions.

3 The Parole Board takes a neutral stance in this application, but in their pre-action protocol letter dated 20th June 2017, which I have read carefully, they set out their detailed reasons why the applicant should not seek to review their decision. We are well beyond that point now.

4 Ms Earis, on behalf of the claimant, has made succinct and careful submissions on behalf of her client, emphasising the key points. I take much of this judgment from the documents which have been filed by the claimant and the submissions which have just been made.

5 The claimant is aged 43 and is currently a prisoner at HMP Wayland. In 1994, when aged 19, he was convicted of murdering his stepmother and sentenced to imprisonment for life with a minimum term of 12 years. His tariff expired on 1st July 2005. He has, however, now spent more than 24 years in prison. While in detention he has acquired an addiction to prescription painkillers. He has been placed in open conditions on six occasions and has each time been moved back to closed conditions after what may be referred to as drug-related incidents.

6 The present challenge arises out of an oral hearing which took place before the Parole Board on 31st May 2017 at which the claimant sought his release or transfer to open conditions. The Parole Board had previously declined to recommend his release in a decision dated 13th November 2009, a decision which was in fact quashed and referred for reconsideration. In

the current decision letter of 2nd June 2017 the Board declined again to recommend his release on licence.

7 That element of the decision, is not, for the reasons I have already given, open to challenge now in this court; but it is the second element, the refusal to recommend transfer to open conditions, which is challenged on the basis of a failure to carry out the appropriate balancing exercise and/or give reasons for the refusal to make the recommendation to transfer.

8 The decision letter, as Ms Earis has pointed out, refers to the application for transfer to open conditions in only two places in the course of its eight pages. The first is in the section headed "Introduction" where, in the second paragraph, the Parole Board wrote:

> "In order to direct release the panel must be satisfied that it is no longer necessary for the protection of the public for you to remain confined. In order to recommend a transfer to open conditions the panel is required to consider the extent of your progress in addressing and reducing your risks, the extent to which you are likely to comply with any form of temporary release from open conditions, the degree of risk that you might abscond and the benefit of testing you in a less secure environment."

It is common ground that those are factors to which the Parole Board is obliged to have regard in carrying out the appropriate balancing exercise when considering an application to transfer to open conditions.

9 Section 2 of the letter identifies the evidence which the panel looked at. Section 3 analysed the claimant's offending. Section 4 is headed "Risk factors", but those factors were plainly related to the application for release rather than the application for transfer to open conditions. Section 5 is headed "Evidence of change since last review and/or circumstances leading to recall (where applicable) and progress in custody". Section 6 is headed "Panel's assessment of current risk", section 7, "Evaluation of effectiveness of plans to manage risk", all of which related to the first head of the application for release. Section 8 is headed "Conclusion and decision of panel" and sets out the reasons in some detail why the panel declined to order the claimant's release. The last three sentences set out the conclusion which the panel reached, in the following way:

> "Therefore the panel does not direct your release. Nor does the panel consider that such risks as you presently represent can be adequately managed in open conditions.

> There can be no confidence you would not soon further abuse drugs and you cannot presently be trusted to comply with open conditions."

There is then a section headed "Indication of possible next steps to assist future panels".

10 The legal framework is as follows. The Parole Board are obliged to comply with directions issued by the Secretary of State under s.239(6) of the Criminal Justice Act 2003 which are headed "Transfer of life sentence prisoners to open conditions". Paragraph 3 of the introduction to the directions states:

> "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 lifer 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."

That is the starting point, identifying that the task which the Parole Board is obliged to undertake is a balance of risks and benefits. Paragraph 4 requires the Parole Board to take into account all the information which it has before it. Paragraph sets out the four factors which were identified in Section 1 of the decision letter in the following terms:

> "The Parole Board must take the following main factors into account when evaluating the risks of transfer against the benefits:
>
> (a) the extent to which the lifer has made sufficient progress during sentence in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where the lifer in open conditions would be in the community, unsupervised, under licensed temporary release;
>
> (b) the extent to which the lifer is likely to comply with the conditions of any such form of temporary release;
>
> (c) the extent to which the lifer is considered trustworthy enough not to abscond;
>
> (d) the extent to which the lifer is likely to derive benefit from being able to address areas of concern and to be tested in a more realistic environment, such as to suggest that a transfer to open conditions is worthwhile at that stage."

11 Therefore, it is apparent not only that a balance has to be undertaken but that the first two of the four factors requires the Parole Board to look at risks to the public, whereas the last two factors require them to look at the potential benefits to the life prisoner, and a balance has to be struck between the two.

12 It is an error of law not to take into account the four factors in balancing risks and benefits in the way required by the directions, as is apparent from the decision of Supperstone J in *R (on the application of Hill) v Parole Board* [2012] EWHC 809 (Admin). The first point made by the learned judge in para.11 of relevance to this case is where he says:

> "However, it is clear that suitability for release and suitability for open conditions require the application of different tests."

In para.12, his Lordship said, in looking at the two different tests relating to release on licence and transfer to open conditions:

> "By contrast, the test set out in the directions relating to the transfer of a lifer to open conditions that I have quoted is a 'balancing exercise' test."

In para.13:

> "However, the different tests for release and transfer to open conditions require a different consideration of risk in the two cases."

13 One would expect a decision letter, where both an application for relief and an application for transfer are in contemplation, to set out separately the two tests to be applied, which in this case the decision letter does, and then separately to address the two tests, which, in my judgment, the decision letter does not do; the reason being, as Supperstone J said, the tests are different and require different considerations. Conclusion on one does not dictate the same conclusion in respect of the other.

14 A decision letter of a Parole Board is not to be read as a statute, but one has to be able to find in it the material which enables the court in an application such as this to evaluate the reasoning process of the Parole Board and to see whether the balance has been undertaken in the way which the directions require, and the four factors taken into account. As Supperstone J said in para.15 of his judgment:

> "Paragraph 5 of the Directions requires the Parole Board to take four main factors into account when evaluating the risks of transfer against the benefits. This the Panel did not do, and thereby erred in law."

15 I was taken also to the decision of King J in *Rowe v Parole Board* [2013] EWHC 3838 (Admin), where the first point of importance made by the learned judge was to emphasise in para.17 that it is for the Parole Board and not for the court to weigh the various considerations which have to be taken into account. The decision on the balancing exercise is one for the Board and not for the court. But the court has to be satisfied that the exercise has been undertaken by the Board and that the balance has been struck. In the *Rowe* case, as King J said at para.60, there was no express reference in the decision letter to the balancing exercise. He said:

> "It is true that the Board refers to the need to have regard to the directions of the Secretary of State in the opening introduction of their decision [as it did in this case]. It is true that the Board refer to the support the claimant had for transfer from the offender's supervisor, the offender manager and Dr Pratt, which if analysed contains references to the benefits which could be directly derived from transfer. It is true that there is a reference to weighing the risk assessment in the balance and to setting Dr Pratt's more favourable views against those more cautious of Miss Fleming. However, nowhere do I find any passage not merely making plain that they have carried out what I have described as the fundamental balancing exercise, fundamental to the decision-making process, but in which they expressly state which factors which go towards benefit have been taken into account."

16 It is exactly the same in this case. There is the statement in Section 1 of the decision letter of the test which has to be applied and there is the conclusion in Section 8 of the decision letter in which the Parole Board say that they have decided that there would be no recommendation that the applicant be transferred to open conditions. But there is no identification by the panel, expressly or otherwise, of the specific factors which should have been taken into account in the separate balancing exercise which was to have been undertaken when considering a transfer to open conditions, as opposed to the test to be applied when considering whether to release the applicant on licence.

17 I have been helpfully referred to the decisions in *Hoffman v Parole Board* [2015] EWHC 2519 (Admin) and *Vigrass v Parole Board* [2017] EWHC 3022 (Admin), but it is not

necessary, it seems to me, in the light of the extracts from the judgments I have just referred to, to cite them in any greater detail.

18 In this case, there is no specific reference in the decision letter to the way in which the Parole Board have evaluated the four factors or the material which they have taken into account in doing so. There is no reference to the benefits to Mr Hutt required by the third and fourth factors. One cannot ascertain from the decision letter the factors which should have been addressed or the process through which the balance exercise was said to have been undertaken; there is simply a conclusion with no reasoning with which this court could grapple in seeking to evaluate whether the process has been undertaken properly.

19 In those circumstances, in my judgment, the claimant is entitled to succeed in his claim. The decision will be quashed and the application for consideration for transfer to open conditions remitted to a differently constituted Parole Board.

MS EARIS: Thank you, my Lord. Only one application, then, which is that there be a detailed assessment of the claimant's publicly funded costs.

JUDGE DIGHT: Yes.

MS EARIS: Thank you.

JUDGE DIGHT: Would you mind drafting a minute of order and emailing it to the Associate?

MS EARIS: Yes, of course.

JUDGE DIGHT: Thank you very much for your help.

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Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
admin@opus2.digital

This transcript has been approved by the Judge.