IN THE HIGH COURT OF JUSTICE **CO/3138/2018**
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY

ADMINISTRATIVE COURT

BEFORE HHJ Kramer sitting as a High Court Judge at the Combined Court Centre, Leeds on 1st March 2019

B E T W E E N :

REGINA
(on the application of DONALD MACKAY)

Claimant

-and-

PAROLE BOARD

Defendant

-and-

SECRETARY OF STATE FOR JUSTICE

Interested Party

MR J BUNTING appeared on behalf of the Claimant
NO APPEARANCE by or on behalf of the Defendant

JUDGMENT
(Approved 01.05.19)

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JUDGE KRAMER:

1. This is an *ex tempore* judgment given on a claim for judicial review of a decision by the Parole Board dated 30 April 2018, following a hearing before the Parole Board on 23 April 2018.
2. In its decision, the Parole Board refused to direct the release of the claimant, Mr Mackay, from prison, or transfer him to open conditions. The application for review was given permission to proceed by His Honour Judge Saffman on 4 October 2018 and, in this application, which is brought by Mr Mackay, he seeks that the court quash the decision made on 30 April 2018, and an order that the Parole Board reconsider the matter which was before them on 23 April 2018.
3. The claimant is represented by Mr Bunting of counsel. The Parole Board and the interested party, the Secretary of State, have not appeared at the hearing. In their acknowledgement of service, they say they take a neutral stance. The consequence is that the arguments and, indeed, the evidence, has all come from one side, namely, the claimant.
4. The challenge in this case is a very narrow one. The claimant says that, on the face of the decision, it is clear that the Parole Board made findings which were unsupported by any evidence and which had a material effect upon its decision. The particular passage in the decision to which the claimant makes reference is to be found in paragraph 17 of the bundle. I will read it in full, although I will need to make further reference to it in the course of the judgment.
5. In the decision letter, the Panel said:

   'The Panel found you dogmatic and vehemently antagonistic and accusatory towards the surviving victim, thus demonstrating a lack of victim empathy and generating a concern about your future attitude to sex workers and, in particular, to non-consensual sexual violence. This was a flash of the old anger which you admit to, and the moment when you threatened the Panel, quite openly, which was quite chilling to behold. You are an intelligent man and have found a way which enables you to survive in prison, but you have not undertaken any significant risk-reducing work, you have no insight into your risk of sexual and sexually violent offending and, as a result, are still a Category A man, and held in closed conditions

of the highest security and no complete risk assessment has been possible. There is still outstanding core risk reduction to be done.'.

6. In the conclusion to its decision, the Panel said:
'The Panel consider that, in view of the evidence, <u>and particularly your testimony before it</u> (my emphasis) your continued confinement is necessary for the protection of the public and so declines to release you.'.
It went on to give an indication as to the possible steps which may be taken but none of which were a move to open conditions.

7. The claimant's case is that the notes of evidence from the Chair of this Panel do not record any evidence to support these statements.

8. There are statements from Mr Purdon, who was the solicitor representative of Mr Mackay, and Mr Matthews, a psychologist who had been instructed by Mr Purdon, to the effect that what is said as to the claimant's behaviour, in the passage which I have just read, did not happen. Neither the Parole Board nor the Secretary of State have sought to contradict what is said by Mr Purdon and Mr Matthews, or to supplement the note to evidence that something of that nature was said.

9. The first ground of challenge is that findings of fact were made which had no basis in evidence and upon which reliance was placed to reach a conclusion as to the risk posed by Mr Mackay.

10. There is a second ground, which is that the assertions that he had been dogmatic, antagonistic and made threats to the Panel, should have been put to Mr Mackay. Since, however, it is the claimant's case that nothing was said by Mr Mackay to give rise to such findings, ground 2 is somewhat superfluous. The claimant simply says, 'This was never said, it never happened.'.

11. There was a third ground of challenge to the decision based on a lack of reasons. That has been withdrawn since the reasons have been produced.

<u>The Facts</u>

12. The background to the claim is the claimant, who was 69 at the time of the hearing, was convicted of murder in 1989 and received a life sentence. The judge recommended a tariff of 30 years. This was subsequently reduced by the Home Secretary to 20 years, which was confirmed by Mr Justice Openshaw on 11 August 2006 as a 20 year tariff, less 10 months and six days for time spent on remand.

13. At the same time as that conviction, he was convicted, on his admission, of preventing the burial of his victim's corpse. He was also convicted by a jury of assault with attempt to commit buggery, attempted buggery, indecent assault on a female and assault occasioning actual bodily harm against another individual, who I will call Ms A, and for these further offences he was given concurrent determinate sentences.

14. The facts of the criminal case were curious in that the first matter that came to light were the offences against Ms A. She was a sex worker. Following the offences to which she was subjected, she had managed to escape from the claimant and obtain assistance. When the police were summoned, they searched the claimant's home and there they found the badly decomposed body of the murder victim wrapped in black plastic bags. She was Miss Petherick, who had also been a sex worker. The bag was found in a room adjacent to where the offences upon Ms A had been committed.

15. The condition of the body was such that the analysis as to the cause of death was difficult. There were numerous fractures, bruises and lacerations and this all pointed to Miss Petherick having been subject to a violent attack. The claimant maintained, as his defence, that Miss Petherick, which whom he had had a relationship of sorts, and whose services he had used as a prostitute, had come to his house in an injured state, having been set upon by others. He claimed that he had gone out to buy a bottle of vodka and, when he returned, he found her dead. To this day, he maintains that he was not guilty of the murder or offences involving Ms A.

16. The Panel had before it evidence of the claimant's offences, the claimant's criminal history, which included a number of assaults and a previous conviction for manslaughter for which he had received a sentence of five years. The latter offence had arisen out of a dispute with another man. The following day he approached this man and killed him with a ceremonial Samurai sword which he had brought with him.

17. The Panel also had evidence from Adam Ottoway, the offender supervisor at the prison, Julie O'Toole, the claimant's Offender Manager, Ms Wordie, a prison psychologist and Rhys Matthews, described as an independent psychologist, but, in fact, instructed by Mr Mackay's solicitor. The Panel also heard from Mr Mackay.

18. The hearing before the Panel was a referral from the Secretary of State, the claimant by then being something like nine years past his tariff date. It was for the Parole Board to determine whether it would recommend release. Mr Purdon's stance was that his client should be moved to open conditions as a precursor to ultimate release.

19. The hearing took place on 23 April 2018. The Panel Chair was Lindsay Addyman with His Honour John Harrow as wing member.

20. At page 45 of the bundle, we have the beginning of the note taken by the Panel Chair. It is said to be a verbatim copy of the contemporaneous notes of the hearing, but it is in note form, this is not a transcript of what was said; it appears to be a typed copy of manuscript notes taken or used at the hearing. On the note there appears the words *'Drunken Celt who gave up his brains and life really to the bottle, killed twice and fell asleep on the job with the third victim who ran screaming in to the street.'* There is then a bit of the background. The note records that the claimant has a diagnosis of Parkinson's, he is not suitable for the remaining programmes. There is no indication in the note as to the source these entries or whether they were made in preparation for, or at, the hearing.

21. The Panel put some questions to Ms Wordie and Mr Matthews., the two psychologists. They seems to have given their evidence in a form of hot tub-type of arrangement. They were asked questions as the same time and Mr Purdon also asked questions of Mr Matthews. The Offender Manager gave evidence, she said there was a high risk of harm. The claimant had not completed Kaizen, which is a sex offenders programme.

22. They were followed by Mr Mackay who gave his account and was asked questions. Mr Purdon asked his client questions and the burden of his answers was that he was much reformed, he had given up drinking, he could avoid future reoffending and he was, therefore, no longer a risk. Mr Purdon was then given the opportunity to sum up.

23. Seven days' later, the Parole Board decision letter, dated 30 April 2018, was produced. The letter is set out with a number of sub-headings and starts of by analysis of offending. This catalogued the claimant's previous offences. It then set out risk factors, which were alcohol abuse, pro-criminal attitudes, lack of insight in to his own risk, poor problem solving skills and lack of victim awareness. It says that these are risk factors which are likely to be present and it points to the fact that the claimant is still denying his offences so has not completed any sexual offender treatment which could have identified the full range of risk factors, most notably an interest in violent sex.

24. Next, there is a paragraph which deals with evidence of change during sentence. There the Panel compares the evidence of the two psychologists. The notes record Ms O'Toole as saying the risk of reoffending which was very much there and work had to be done before release. The panel looked at the conflict in the evidence between Mr Matthews and Ms Wordie.

25. It was Ms Wordie's view was that there was a continuing risk and work to be done with Mr Mackay. Mr Mathews thought there had been a reduction in risk and that he could be safely managed in open conditions; in part he based his on the fact that Mr Mackay was 69 and had Parkinson's disease. His view was that alcohol had been the problem but Mr Mackay recognised that and seemed to have changed his life.

26. The decision letter recorded, and this is supported by the notes, that Mr Mackay said that he had been a binge drinker in the past but he now despised alcohol. In relation to Ms A, he said that she was very big and very strong and violence against her would have proved impossible; that, in a sense, was to justify his continuing denial of guilt. He said that he had not been engaged in violence for 26 years. He added that if he was in open conditions, he would not drink, he would do everything right. This was a response he gave in reply to the question which was posed to him as to whether he would continue to use prostitutes. and it is said that he regards his life as wasted and the only important people in his life were his four sisters and their children and the risk assessments were no longer accurate.

27. The Panel looked at risk assessments and its view was that there continue to be risks. They looked at the plan to manage the risk and then they came to their conclusions and decision. In doing so, of course, they had to resolve the different pictures painted by Mr Matthews and Ms Wordie as to whether treatment was necessary and upon the level of risk. They identified that the prison professionals considered that there was still work to be done in relation to risk and this would have to be undertaken before a progressive move could be considered. They identified that Mr Matthews thought there were reductions in risk which meant that the claimant was unlikely to abscond or present any risk of harm in the future and could be moved to open conditions.

28. In the decision letter, having identified the dispute between the prison professionals and Mr Mathews, the panel then set out its findings and conclusion starting with the passage which I quoted in the beginning of the judgment. It resolved the dispute between Mr Matthews and Ms Wordie and the other professionals in this way. Having dealt with the passage I have just identified, they said,

> *"The Panel did not subscribe to Mr Matthews' view that no further treatment was necessary. It preferred the opinion of Ms Wordie and various psychologists, which was more in tune with the body of evidence. It was concerned that your risk of sexualised violence had never been properly identified, assessed or treated."*

It recommended that steps should be taken towards some treatment and then it went on:

"The Panel considered that, in view of the evidence, and particularly your testimony before it, that continued confinement is necessary for the protection of the public and so declines to release you.".

The Law

29. What is the role of the Parole Board? I have been provided with Section 28 of the Criminal Sentences Act 1997. Section 28(1A) applies the section to a life prisoner in respect of whom a minimum term order has been made, so that is the claimant. Subsection (5) provides that:

> *"As soon as*
> *(a) a life prisoner to whom the section applies has served the relevant part of his sentence; and*
> *(b) the Parole Board has directed his release under this section,*
> *it shall be the duty of the Secretary of State to release him on licence."*.

30. There is no dispute that the relevant part of this claimant's sentence was 20 years, which expired in 2008/9.

31. Subsection (6):

> *"The Parole Board shall not give a direction under subsection (5) above with respect to a life prisoner to whom this section applies unless*
> *(a) the Secretary of State has referred the prisoner's case to the Board"*

which is this case,

> *"and*
>
> *(b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."*.

32. The historical, and current role, of the Parole Board is set out in **R (Brooke) v Parole Board [2008] 1 WLR 1950 at [43]to [53]**. As this is an *ex tempore* judgment and the role there set out was acknowledged in one of the other cases to which I was referred, **R (McIntyre) v The Parole Board [2013] EWHC 1969 Admin**, there is no need for me to read out those paragraphs, they are there to be read.

33. It is sufficient to say that the Parole Board now has a judicial function. It must decide whether it is necessary for public protection for the prisoner to be confined. What is necessary for the protection of the public is that the risk of reoffending is at a level which does not outweigh the hardship of keeping the prisoner detained after he has served a term commensurate with his fault. That is to be found at paragraph 53 of **R (Brooke) v Parole Board.**

34. The Parole Board must ensure that it has a proper record of the hearing. There are no

recording facilities at such hearings and that obligation is discharged by the Chair taking a note. The Chair's note prevails as the record for use in any further proceedings. The authority for those propositions are to be found in **R (McIntyre) v The Parole Board at [20] –[23].**

35. Turning to the role of the Administrative Court in reviewing a decision of the Parole Board. This was recently considered by the Court of Appeal in **Browne v The Parole Board of England & Wales [2018] EWCA Civ 2024.** In giving the judgment of the court, Coulson LJ reviewed a number of authorities on the test for judicial review in relation to decisions of the Parole Board. Again, I am not going to go through all of the authorities because they all appear in the decision. He referred , at [47], to **R (Alvey) v Parole Board [2008] EWHC 311 (Admin)** and the judgment given by Stanley Burnton J at [26]. The principle which arises from that extract is that it is not for the court to substitute its own decision for that of the Parole Board. It is they who have the task of weighing up the competing considerations and assessing the risk.

36. Having reviewed the authorities, Coulson LJ, at [51] of **Browne v The Parole Board of England & Wales**, the court said

> *"The test applied by the Divisional Court in DSD, and in all the other authorities noted above, is whether the decision of the Parole Board could be said to be irrational in accordance with the classic test set out in Associated Provincial Picture Houses v Wednesbury Cooperation [1948] 1 KB 223 at 229."*

The only gloss upon that test, which he referred to at [52], is that since the liberty of the claimant is at stake, any challenge must result in the court looking at the decision with anxious scrutiny. At [53] he continued that, apart from that modification,

> *"I can see no basis for this court to depart from the conventional approach to the review of Parole Board decisions. The relatively high threshold of irrationality is appropriate when the Administrative Court is reviewing the decisions of the Parole Board. It properly reflects the Parole Board's judicial function, its inquisitorial role, its specialist expertise, and the important and complex role that it performs."*.

37. Therefore, there has to be a high threshold for irrationality and that, of course, accommodates the recognition that it is the Parole Board which has the expertise and is entrusted with the judicial function of looking at risk and balancing whether the risk is such that a prisoner should remain beyond what may be called the punitive part of his sentence. The Administrative Court, of course, not having such day-to-day experience, is not really in a position to second guess what the Parole Board should have done, and must not do so.

38. In this case, irrationality is the basis of the challenge. That is to say Wednesbury unreasonableness. Although irrationality and unreasonableness are often used interchangeably, the former is only a facet of the latter; De Smith on Judicial Review 8th Ed para 11.032. Here I am concerned with irrationality and, in particular whether the decision lacks sensible logic or comprehensible justification.

39. A material mistake as to a material fact can render a decision irrational. De Smith on Judicial Review cites a large number of examples of cases where it has been held that a finding which was based on no evidence cannot be comprehensibly justified; see paras 11.047 and 11.051. I have not referred to this large body of cases because it seems to me axiomatic that you cannot justify a decision of fact which is based on no evidence, or a judgment based upon such findings of fact.

Discussion

40. I am, of course, required to give the Board's decision anxious scrutiny , given that the liberty of the subject is at stake. Conceptually, the fact that the protection of the public is at stake should also demand the exercise of anxious scrutiny. Therefore, I have looked at the passages in the decision about which objection is taken, and compare it with the note of evidence.

41. I consider the assertion that the Panel found Mr Mackay dogmatic and vehemently antagonistic and accusatory towards the surviving victim. I have looked, in the evidence, where this could be found. All I have found is that in the hearing note at, page 49 of the bundle, there is a record which reads as follows: *"We note from Ms A's testimony what happened to her (comment of other Panel member)"* and then, in what clearly must be a record of Mr Mackay's response, it says, "*She lied. Lack of emotionally intimate relationships. Never been violent/take up what they say; observe the world; cigarettes, choking her something straight back, Vaseline. She was so strong"*. Then it goes on: *'Clinic for anti-psychotic co/methadone/alcohol wouldn't trust her to run wouldn't..naive superhuman.* . What follows is, *'Mr Purdon Good while some violent conduct, no violence for 26 years.'*.

42. This passage in the notes seems to show that the writer of the decision letter was working their his way through the notes of evidence to produce the decision as it reflects what is to be found in the decision letter at page 15 of the bundle. The decision records, *'You said that the victim was very big and very strong and violence against her would have proved impossible'*. It goes on *'There has now been no violence in your life for 26 years.'. 'She lied. Lack of*

emotionally intimate relationships.', has been followed by *"no violence for 26 years"* which is almost as it appears in the note of evidence.

43. It is difficult to know what is to be made of the note *'Choking her something, straight back, Vaseline'.* Clearly, that seems to be some reference to what was being said about the events of the evening at the time of the offence against Ms A. It seems to be some sort of factual narrative. It is impossible to identify in this note, that the claimant said anything to show that he was dogmatic and vehemently antagonistic and accusatory towards the surviving victim. It is right that he said, *"She lied"*, notably it does not say that she is a liar. He is simply saying that what she said about the events of the night was not the truth and, of course, that is a feature of his denial of the offence.

44. Where the decision letter goes on to say, later in this passage, and after referring to the dogmatic vehemence and antagonism, *'This was a flash of the old anger which you admit to'*, There is no note of there being any flash of anger, but possibly more importantly, there is no record of any admission to there being the old flash of anger or that he is capable of maintaining the old flash of anger. Then the sentence goes on, *'and the moment when he threatened the Panel, quite openly, which was chilling to behold.'*. Again, there is no record of there being any threat to the Panel.

45. Apart from these observations in the decision letter not being reflected in the notes, there is evidence from witnesses to the event, Mr Purdon and Mr Matthews, who say that this did not happen.Therefore, the finding that the claimant was dogmatic and vehemently antagonistic and accusatory towards the victim, and that he displayed a flash of anger which he admitted to, and that he made a chilling threat, or, indeed, any threat to the Panel, is not supported by the evidence.

46. Were these findings material to the decision? They clearly were because, when we look at the decision, the very last paragraph under 'conclusion and decision', records the Panel considered that, in view of the evidence and particularly your testimony before it, your continued confinement is necessary.

47. On any analysis of the notes of evidence, and, indeed, the summary of such notes, as contained in the decision, that part of the alleged testimony, and, indeed, the only part which is included in the 'conclusions and decisions' section, is highly relevant to risk and yet, the court is faced with a situation where there is no evidence that this actually has happened.

48. The Secretary of State, who has taken no part in these proceedings or sought to contradict Mr Purdon's and Mr Matthews's statements, and the Parole Board, have not sought to explain

how these words came to be included in the decision, notwithstanding that they are not reflected in the notes of evidence.

49. Therefore, all the evidence on this has been one way and the Parole Board have clearly relied upon these as facts material to its decision. That is apparent both because these behaviours are the only factual behaviours said to be taken from his testimony, which identify this risk, and because although there clearly was other evidence of risk to be found in the evidence produced by the Prison Service, the Board said it relied in particular on his testimony.

50. I recognised that one has to be careful about reaching a conclusion as to what was material, based upon the way that the decision is laid out. The fact, however, is that under 'conclusions and decisions', the Board identifies the difference of views between the two psychologists, it calls them psychiatrists, which needs to be resolved. That is by the reference to these behaviours on the part of the claimant to which it has particular regard. In the next paragraph they resolve the dispute between the Mr Matthews and Ms Wordie in favour of the latter. It looks as if they have paid particular account to what they claim the claimant said, in resolving that particular dispute and, therefore, I am sure that this was a highly material consideration in their decision that the level of risk was such that it was not consistent with public safety that the claimant be released or even moved to open conditions.

51. In those circumstances, this was a decision which was taken on facts unsupported by evidence. It is not, therefore, logically justifiable and it must be quashed and an order made for the Parole Board to reconsider the reference which they dealt with on 23 April 2018.

52. I will add this as a post script to the judgment. In a digital age, one would hope that recording equipment would be available. It would be extremely helpful if these hearings were recorded, not only because a court and the parties could be more confident as to the accuracy of what was said, which has an importance which is wider that in relation to the subsequent decision because records of what is said at one parole hearing carries forward to further parole hearings. It would also be helpful in capturing the way in which something was said and, therefore, how it should be received.

53. If, for example, an assertion is made about a victim which is coupled with an agitated or raised voice, that does give some insight in to what the prisoner is actually thinking. The danger of simply relying upon the handwritten note is that it only reflects the notetaker's impression as to what was said. It is in a form which is one familiar to judges and counsel, which combines the question and answer, but often the way in which the answer is given to a particular question can be important. Further, the attention of the notetaker, and thus the note, can be

influenced by what they are doing at the time. For example, it is much more difficult to take an accurate note if you are the person asking the questions.

54. I only add that as a post script. The question as to whether, in the absence of a system of producing necessarily accurate notes, the ability to challenge decisions of the Parole Board is sufficiently undermined to potentially render challenges ineffective, seems to me one for consideration at a higher level. It is fairly obvious, particularly from this case, that difficulties can arise when you do not have either a verbatim transcript or a recording to work from.

55. The second post script is that it is clear that there was a gap of seven days between the hearing and the decision. A worrying feature of this case is that it may be that the author of the decision confused two different cases and that there was another prisoner who displayed the behaviours which have been ascribed to Mr Mackay.

56. That is not only worrying, because Mr Mackay may have suffered as a result of such confusion, but it may be that, if there is some other individual who behaved in this way, those behaviours were not ascribed to them when a decision was taken as to the risk which they posed. This again, it is just a post script, but it is worrying because it is so curious that something which is not in the notes appears in the decision.

57. Whether the Parole Board think this is of sufficient concern to investigate how this error arose and as to what steps it takes to allay such concern are matters for the Parole Board and I say no more about that.

58. Finally the order. The order will be that the decision of the Parole Board dated 30 April 2018 be quashed.

59. The Secretary of State's referral which had been heard on 23 April 2018, be reheard by the Parole Board.

End of Judgment

Transcript from a recording by Ubiqus
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com