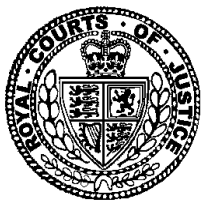

Neutral Citation Number: [2020] EWHC 1486 (Admin)

Case No: CO/4465/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

HEARING BY VIDEO LINK: COVID-19

Royal Courts of Justice
Strand, London, WC2A 2LL

28/05/2020

Before:

JUDGE ALLEN
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

THE QUEEN **(on the application of OMAR STEPHENS)**	**Claimant**
- and -	
THE PAROLE BOARD OF ENGLAND AND WALES	**Respondent**
SECRETARY OF STATE FOR JUSTICE	**Interested Party**

- -

Mr J Jennett (instructed by **GT Stewart Solicitors**) for the **Claimant**
The Respondent did not appear and was not represented
The Interested Party did not appear and was not represented

Hearing date: 28 May 2020

- -

JUDGMENT

Judge Allen:

The claimant was convicted of murder on 9 January 2006 after a trial at the Central Criminal Court. The offence took place on 13 October 2004 when he was aged 20. He was sentenced to life imprisonment as was his co-defendant. The claimant was given a tariff of seventeen years' imprisonment.

1. The claimant's case was referred to the Crown Court as a non- tariff expired life indeterminate sentenced prisoner to consider whether he was ready to be moved to open prison conditions. In a decision dated 22 July 2019 the Parole Board declined to recommend transfer to open conditions. The claimant challenged this decision by way of a claim sealed on 13 November 2019, arguing first that the defendant had erred in failing to take into account all the factors it is required by law to consider in such a case and secondly that it had failed in its duty of inquiry amounting to procedural unfairness. The claimant sought a quashing order and a mandatory order to consider his case with expedition.

2. The defendant has filed an Acknowledgement of Service stating that in accordance with its litigation strategy and case law authorities such as R(Davies) v HM Deputy Coroner for Birmingham (Costs) [2004] 3 All ER 543, as it exercises a judicial decision-making function it remains neutral and will not normally seek to defend the decision of a panel to refuse to recommend a prisoner's transfer to open conditions. That is its position in this case.

3. The Secretary of State for Justice is an interested party and in a letter dated 25 November 2019 it was stated that the Secretary of State would remain neutral and not lodge an Acknowledgement of Service or make submissions.

4. Permission was granted by Clare Montgomery QC sitting as a Deputy High Court Judge, on 6 December 2019.

The Law

5. Section 239(2) of the Criminal Justice Act 2003 imposes a duty on the Parole Board to advise the Secretary of State for Justice in respect of any matter referred to it by him which is to do with the early release or recall of prisoners. Section 239(6) provides that the Secretary of State may also give the Board directions as to the matters to be taken into account by it in discharging any function.

6. The directions issued by the Secretary of State under the above provisions state at paragraph 7 as follows:

> "The Parole Board must take the following main factors into account when evaluating 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."

7. It is clear from authorities such as Alvey v Parole Board [2008] EWHC 311 (Admin) that decisions of the Parole Board are amenable to judicial review. We also see from Vigrass v Parole Board [2017] EWHC 3022 (Admin) that the Parole Board is required to address in terms whether or not the claimant is suitable for transfer to open conditions. Of particular relevance is R(Grantham) v Parole Board for England and Wales [2019] EWHC 116 (Admin) where Holman J, having reviewed the decision letter in the context of the mandatory factors which I have set out above which are required to be taken into account, said at paragraph 24:

> "In my view, the Parole Board have not demonstrated that they gave any real separate and discrete consideration to transfer to open conditions, nor to the 'main factors' which they are directed to take into account by the Secretary of State for Justice."

8. As regards the duty of sufficient inquiry/procedural fairness this derives from Secretary of State for Education and Science v Tameside MBC [1977] AC 1014, which was more recently summarised by Mr Justice Haddon-Cave, as he then was, in R (Plantagenet Alliance Ltd) v Secretary of State for Justice [2014] EWHC 1662 (Admin). He said the following:

> "A public body has a duty to carry out a sufficient inquiry prior to making its decision. This is sometimes known as the 'Tameside' duty since the principle derives from Lord Diplock's speech in Tameside where he said: 'The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?'."

9. Haddon-Cave J went on to say that:

> "The following principles can be gleaned from the authorities:
>
> (1) The obligation upon the decision maker is only to take such steps to inform himself as are reasonable.
>
> (2) Subject to a Wednesbury challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken.
>
> (3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision.
>
> (4) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient.

(5) The principle that the decision maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion.

(6) The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it."

Ground 1

10. On behalf of the claimant it is argued that only factors 1 and 3 of the four factors I have set out were considered by the respondent, i.e. the extent to which the claimant has made sufficient progress in addressing and reducing risk and the extent to which he is trustworthy enough not to abscond, though in that regard the point is also made that regard was only had to the risks of absconding rather than the trustworthiness or otherwise of the claimant. Hence, it is argued, the respondent did not consider the extent to which the claimant is likely to comply with the conditions of any such form of temporary release from open prison: factor 2, and the extent to which the claimant is likely to be able to address areas of concern and be tested in open conditions such as to suggest transfer to open prison is worthwhile at that stage: factor 4.

11. In my view, there is force in that argument. The decision letter certainly sets out the relevant factors at page one and then refers to the evidence considered by the panel. There is then an analysis of the offending and thereafter a section devoted to risk factors. Then there is a detailed consideration of evidence of change since the last review and progress in custody, including the views of Ms Price-James, the claimant's offender supervisor, and Mr Buttress, the claimant's offender manager, both of whom recommended that he be transferred to open conditions.

12. In the next section the panel made its assessment of current risk both as to harm and as to absconding. Then, in the final substantive paragraph, which is headed: Conclusion and Decision of the Panel, the following is said:

> "You are a pre-tariff life sentence prisoner so the Panel could only consider whether to recommend a transfer to open conditions. Whilst noting you maintain innocence the Panel did not give weight to this when considering your suitability for progression. Mr Hodkin drew the Panel's attention to your respect for the justice process and your acceptance of your sentence. The Panel accepted you have undertaken all work you have had access to and that you have maintained good behaviour engaging positively with the custodial regime. Whilst you face UK border agency action the Panel saw no other evidence to suggest you pose a raised risk of abscond.
>
> However the Panel was concerned that you have not undertaken any risk reduction work. Work to address identified risk factors should be possible despite maintenance of innocence. Reports in the dossier refer to you as an appellant; the Panel confirmed this is not the case. The Panel considered your background, lifestyle and the circumstances of the index offending would benefit from further exploration. Current assessments are largely based upon your self-report, and the Panel was concerned that your offender manager had not had

> access to your full probation file including the post-sentence report. The Panel noted that you had gravitated towards a criminal peer group within a short period of coming to study in the UK and became involved in serious offending, but little is understood about how this happened. There has been no liaison with your partner or aunt, thus it is difficult to properly assess whether they offer pro-social support. With regard to your lifestyle at the time of the index offence, the Panel found some of your answers evasive. The Panel was surprised that you had not been encouraged to engage with work to assess and address substance misuse given your admissions of using prior to and during the sentence.
>
> To recommend open conditions the Panel should be confident that areas of core risk have been addressed. Whilst you maintain innocence a number of such factors have been identified but no work has been done to address these areas. Given the outstanding areas of risk the Panel could make no recommendation for progression."

13. One does not see there any consideration of the matters to be addressed under factors 2 and 4, as is contended in the challenge to the decision. The focus in the concluding decision paragraph appears to be mainly on risk reduction. Accordingly, I find that the panel erred in law in not according with the guidance set out in the authorities such as Grantham and also R (Butt) 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.

Ground 2

14. The above is enough to dispose of the application in that it must follow that the decision is unlawful. Hence, I need to say little about ground 2 except to observe that I see the force in particular in the argument that the fact that the offender manager, Mr Buttress, had not reviewed the claimant's paper file nor had sight of the post-sentence report meant that he could not provide the board with information about the content of those items, which was a relevant lack of information. Likewise, the fact that Mr Buttress had not made contact with the claimant's aunt and partner, in effect his entire support network, was material to the issues under consideration. This evaluation is supported also by the points made in argument by Mr Jennett in respect of what was said in DSD v The Parole Board and the Secretary of State for Justice [2018] EWHC 694 (Admin). The matters not considered are of relevance to the risk assessment and as a consequence I conclude that the claim is made out on both ground 1 and ground 2.

15. As regards relief I understand from Mr Jennett that what is sought is a declaration that the decision is unlawful and an order quashing that decision. Both of those appear to me entirely proper remedies overlapping somewhat though they do and therefore a declaration in appropriate terms and a quashing order likewise will be made.

16. As regards the mandatory order for expedition I think the difficulty with this is that I have no knowledge of the ability of the Defendant in the current difficulties to hold hearings, let alone as to the timing of any hearing. In the circumstances I consider I can do no more than express strong encouragement for expedition in this case.

17. On the above basis, the claim is allowed.