[2021] EWHC 2705 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Case No. CO/1258/2021

The Courthouse
1 Oxford Row
Leeds
LS1 3BG

Thursday, 9th September 2021

Before:

HIS HONOUR JUDGE SAFFMAN SITTING AS A JUDGE OF THE HIGH COURT

B E T W E E N:

R (OAO PIERPOINT)

and

THE PAROLE BOARD OF ENGLAND AND WALES

MR M BIMMIER appeared on behalf of the Claimant
NO APPEARANCE by or on behalf of the Defendant

APPROVED JUDGMENT

HHJ SAFFMAN:

1. By these proceedings the claimant, Macauley Pierpoint, challenges a decision dated 12 January 2021 made by the defendant, the Parole Board of England and Wales, by which the defendant declined to order an oral hearing of the claimant's parole review.
2. The claimant asserts that the refusal was flawed for procedural unfairness, failure to have regard to the material consideration, and failure to give adequate reasons.
3. The claimant is represented by Mr Michael Bimmier of counsel. The Board is unrepresented and has taken a neutral stance with regard to this application, The Secretary of State for Justice is joined as an interested party. On 26 July, he notified the Court, through the Government Legal Department that he too, intended to remain neutral. Therefore, neither the defendant nor the interested party are represented today.
4. On 20 July 2021, HHJ Gosnell, sitting as a judge of the High Court, granted permission to the claimants to apply for judicial review, and this is the substantive hearing. Notwithstanding the fact that there is no active opposition to the application, nonetheless, it behoves the Court to still consider the claimant's claim on the merits.
5. In June 2018, the claimant was convicted of possession of controlled drugs with intent to supply, possession of two offensive weapons and the acquisition, use and possession of criminal property.
6. He was sentenced to imprisonment of three years and six months. On 24 October 2019, he was released on licence. His sentence expiry date is 5 December 2021, so about three months away.
7. In October 2019, almost exactly one year after he was released on licence, he was charged with two offences of assault by beating his then pregnant partner. He was also charged with one offence of animal cruelty against his partner's dog. He pleaded guilty to all the charges, and on 28 October, he was sentenced to a 12 months' community order with a rehabilitation activity requirement and, and this is important, he was made subject to a three-month restraining order in relation to the assault victim, his pregnant girlfriend.
8. As I understand it, on the same date, his licence was revoked and he was recalled to prison on the ground that he had breached his licence conditions to be of good behaviour and not to commit any further offences.
9. At the time of his recall, his risk of serious harm was assessed as medium to the public, to a known adult (presumably his girlfriend), and to children, and of low risk to prisoners and staff.
10. Where a prisoner on licence is recalled, the matter is referred to the Parole Board in accordance with section 256A of the Criminal Justice Act 2003, in order for the Board to consider whether it should direct either the prisoner's immediate release or his release at a future date or make no directions as to release, in which event, the prisoner will remain in custody until his sentence expiry date.
11. What is called "a Part B report" is completed by the prisoner's community offender manager (COM), and that was completed in this case. The COM noted that, and I quote:

> *"Despite myself and prison offender manager having planned a telephone call, so I could make contact with Mr Pierpoint on Friday 6 November at 10.30am, were we were unable to reach him with regards to Mr Pierpoint's understanding of why he was recalled. Due to not having contact with Mr Pierpoint, I have been unable to directly obtain information from him".*

12. It is right to say that at the time of the Part B report, I am told the assessment of the claimant's risk of serious harm had increased to high to known individuals and to children; up from medium, and from medium to the public; up from low. It remained low to staff.
13. As I understand it, this reassessment of risk was based upon a belief that the claimant had contacted his partner after recall in violation of the restraining order that had been imposed when he was sentenced in October 2020. It was, I think, also informed by the belief that he had failed to provide information, or the correct information, to probation officers regarding his partner's pregnancy, his medication, whether he was taking it appropriately, and whether he was in fact, taking illegal drugs.
14. As a consequence, the community offender manager did not support release and neither did the defendant when it considered the matter on the papers.
15. It is open to a prisoner who has been refused release on the papers, to make an application for an oral hearing and a consequent reconsideration of the initial decision. That application was made by the claimant on 10 December 2020, and was considered by a duty member of the Parole Board on 12 January.
16. The member of the Parole Board declined to order an oral hearing, and the reasons given were brief and set out in the letter of that date. The refusal letter stated:

> *"We refer to the provisional decision of your parole review, recently issued by a single member panel.*
> *As set out in the decision, you are allowed 28 days in which to consider whether to accept the decision or request an oral hearing.*
> *We confirm that you have requested an oral hearing via legal representations. The basis of this request is that the original panel did not have representations. There was no report from the offender supervisor and the offender manager had not interviewed you.*
> *In making the decision, the MCA member notes that you received an additional community order and a restraining order for violent offences against your then partner and her dog. It is noted that you are assessed a posing a high risk of serious harm to known adults and your daughter. The MCA member considered whether an oral hearing was required, but concluded that it was not.*
> *Having carefully reviewed all information in the dossier, the duty member also concludes that there is sufficient information to make a fair assessment of risk on the papers, and that an oral hearing is not required in the interest of fairness.*
> *The representations submitted have been considered and the request has been refused, for the reasons stated above.*
> *The paper decision is therefore, final and your current review is now concluded in accordance with the Parole Board rules".*

17. As I have said, it is this decision which is challenged on the three grounds which I have specified. Mr Bimmier relies to a great extent on the guidance given in the leading authority on oral hearings, namely the Supreme Court decision in *Osborn v The Parole Board* [2013] UKSC 61, *Booth v the Parole Board* [2013] UKSC 61 and *Re Reilly* [2014] AC 115. It is a decision which clearly has to be at the forefront of the Parole Board's thinking when considering questions relating to the appropriateness of an oral hearings and indeed, it must be at the forefront of the Court's thinking when considering whether a Parole Board's decision to refuse an oral hearing was lawful.

18. I was referred specifically to paragraph 2 of that judgment in which Lord Reed defines the framework by which to assess the appropriateness of an oral hearings. Paragraph 2 states:

"It may be helpful to summarise at the outset the conclusions which I have reached.

i) In order to comply with common law standards of procedural fairness, the board should hold an oral hearing before determining an application for release, or for a transfer to open conditions, whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake. By doing so the board will also fulfil its duty under section 6(1) of the Human Rights Act 1998 to act compatibly with article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in circumstances where that article is engaged.

ii) It is impossible to define exhaustively the circumstances in which an oral hearing will be necessary, but such circumstances will often include the following:

a) Where facts which appear to the board to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility. The board should guard against any tendency to underestimate the importance of issues of fact which may be disputed or open to explanation or mitigation.

b) Where the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed and addressed. That is likely to be the position in cases where such an assessment may depend upon the view formed by the board (including its members with expertise in psychology or psychiatry) of characteristics of the prisoner which can best be judged by seeing or questioning him in person, or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds, or where the board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist. Cases concerning prisoners who have spent many years in custody are likely to fall into the first of these categories.

c) Where it is maintained on tenable grounds that a face-to-face encounter with the board or the questioning of those who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him.

d) Where, in the light of the representations made by or on behalf of the prisoner, it would be unfair for a "paper" decision made by a single member panel of the board to become final without allowing an oral hearing: for example, if the representations raise issues which place in serious question anything in the paper decision which may in practice have a significant impact on the prisoner's future management in prison or on future reviews.

iii) In order to act fairly, the board should consider whether its independent assessment of risk, and of the means by which it should be managed and addressed, may benefit from the closer examination which an oral hearing can provide.

iv) The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate

interest in being able to participate in a decision with important implications for him, where he has something useful to contribute.

v) *The question whether fairness requires a prisoner to be given an oral hearing is different from the question whether he has a particular likelihood of being released or transferred to open conditions, and cannot be answered by assessing that likelihood.*

vi) *When dealing with cases concerning recalled prisoners, the board should bear in mind that the prisoner has been deprived of his freedom, albeit conditional. When dealing with cases concerning post-tariff indeterminate sentence prisoners, it should scrutinise ever more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff.*

vii) *The board must be, and appear to be, independent and impartial. It should not be predisposed to favour the official account of events, or official assessments of risk, over the case advanced by the prisoner.*

viii) *The board should guard against any temptation to refuse oral hearings as a means of saving time, trouble and expense.*

ix) The board's decision, for the purposes of this guidance, is not confined to its determination of whether or not to recommend the prisoner's release or transfer to open conditions, but includes any other aspects of its decision (such as comments or advice in relation to the prisoner's treatment needs or the offending behaviour work which is required) which will in practice have a significant impact on his management in prison or on future reviews.

x) "Paper" decisions made by single member panels of the board are provisional. The right of the prisoner to request an oral hearing is not correctly characterised as a right of appeal. In order to justify the holding of an oral hearing, the prisoner does not have to demonstrate that the paper decision was wrong, or even that it may have been wrong: what he has to persuade the board is that an oral hearing is appropriate.

xi) In applying this guidance, it will be prudent for the board to allow an oral hearing if it is in doubt whether to do so or not.

xii) The common law duty to act fairly, as it applies in this context, is influenced by the requirements of article 5(4) as interpreted by the European Court of Human Rights. Compliance with the common law duty should result in compliance also with the requirements of article 5(4) in relation to procedural fairness.

xiii) A breach of the requirements of procedural fairness under article 5(4) will not normally result in an award of damages under section 8 of the Human Rights Act unless the prisoner has suffered a consequent deprivation of liberty".

19. The first ground is that this decision to refuse an oral hearing was procedurally unfair. It is alleged it is unfair on a number of different sub-grounds. The first is that the COM had had no contact with the claimant between recall and the submission of her report to the Parole Board and that, accordingly, her risk assessment was made entirely without taking into account the claimant's version of events or any explanations he might have offered.

20. No reasons were given in the papers as to why the only attempt to contact the claimant had been one unsuccessful telephone call. It is not clear why contact had not been possible on 6 November, and, if there was good reason why it was not possible, why it would not have been possible to make contact at some other time.

21. There has been no suggestion that the claimant did not refuse to engage with the COM in the preparation by her of her Part B report. Even if there had been a refusal to engage, then Mr Bimmier argues, that there is authority that establishes that that in itself would not have been enough to enable the Parole Board to go ahead and make a decision without at least providing some opportunity for the claimant to have some sort of input into the Parole Board's considerations.
22. In fact, it appears that the claimant denied that he contacted his girlfriend at all, much less in breach of a restraining order. Mr Bimmier suggests that had COM made contact with the claimant no doubt she would have been told that by him. I remind myself that the belief that he had done so was one of the matters which informed the COM in her decision not to support a release.
23. *Osborn* indicates that one of the reasons where it would be often appropriate to order an oral hearing, is where there is a dispute about factual matters which might be relevant to the decision that the Parole Board makes in respect of any application with which it has to deal.
24. Here, Mr Bimmier asserts that there is a dispute about factual matters, but still, notwithstanding that, there has been no oral hearing at which those factual matters can be determined. Mr Bimmier argues that is in breach of the guidance given in *Osborn.*
25. Secondly, it is contended that the procedure by which an oral hearing was refused was unfair, because the defendant did not have the benefit of a separate report by the Prison Offender Manager (POM), and thus, no up-to-date information on the claimant's behaviour in prison.
26. At an oral hearing it is routine for the POM to give evidence as to how the prisoner has behaved, and it is one of the factors that the Board may take into account in considering release. I will be corrected if I am wrong, but the evidence in this case is likely to have indicated that the claimant's conduct in prison was good.
27. It is contended by sub-ground two that the failure to hold an oral examination precluded the claimant from putting forward evidence which would have assisted him in his application for a release earlier than his sentence expiry date.
28. Thirdly, it is contended that the Parole Board's initial decision on the papers not to release makes reference to "*superficial*" compliance and response to supervision. That is based on the COM's belief that the claimant had failed to comply with the restraining order, and had also failed to be open and truthful with probations officers.
29. Of course, as I have already said, some of these premises are least, are disputed, and in any event, it is not documented anywhere that these serious allegations (so serious that they caused the board member dealing with the original application to take the view there had only been only "*superficial*" compliance in response to supervision) were ever put to the claimant following recall. Accordingly, it is said, there was no opportunity given to the claimant to give an account or an explanation. Once again, Mr Bimmier asserts that is procedurally unfair.
30. In addition, it is true to say that in his written representations to the Parole Board, the claimant had provided information about accommodation if released. He suggested that he was able to live with his father and brother, well away from his ex-partner's home. That too, it is suggested, was relevant to his risk management even if his account that he had not contacted his partner was regarded with scepticism. As I understand it, and I will be corrected if I am wrong, it was certainly not referred to by the board in its original decision, neither was it referred to by the duty member who refused an oral hearing.
31. Fourthly, Mr Bimmier argues that the dossier provided by the Secretary of State to the defendant relating to the further offences which prompted the recall was very limited with regard to the information contained within it. There was no pre-sentence report available; no trial judge's sentencing remarks; no Crown Prosecution Service file; no police reports; and not even a report from the arresting officer or from the officer in charge of the investigation.

32. There was no input from the claimant with regard to this further offending and accordingly, it is suggested that there was insufficient information to properly assess, on the basis of this further offending, the claimant's future risk. There was, it is suggested, insufficient information for an initial decision to decline release on the papers, and the subsequent decision not to order an oral hearing.
33. Mr Bimmier argues that all of the above makes the decision procedurally unfair. He suggest it departs form the guidance in *Osborn* and he supports that contention by specific reference to paragraphs 2(ii)(a), (iii), (vii) and (xi).
34. There is a second ground "failure to have regard to material consideration". It is separate from the fairness ground, and it centres on the failure of the COM to consult the claimant and the fact that the decision was made in the absence of any explanation by the defendant.
35. This is particularly so since the representations made on behalf of the claimant in seeking an oral hearing, specifically asked for an oral hearing in order that consideration could be given to the defendant's explanation. It made specific reference to the fact that there had been a failure by the COM to make contact with the claimant before the initial decision had been made.
36. The third ground is "failure to give adequate reasons". I have set out above the very brief letter by which an oral hearing was refused. It is argued that the letter is no more than a "ritual incantation" of the relevant test, - if it is ritual incantation at all. It gives no explanation about why an oral hearing has been refused.
37. I am satisfied that this challenge succeeds on all 3 grounds. I accept that there has been procedural unfairness, because of the absence of any contact with the claimant before the Part B report was completed. In addition, the information available to the Board was not complete without the evidence of the POM as to the claimant's behaviour in prison and the explanation that the claimant may have had relating to his new offending and alleged contact in breach of the restraining order. In effect, the decision of the Board that there had been only "superficial" compliance and responses to supervision was made without reference to any explanation by the claimant; and that the Parole Board had no, or very little, information as to the circumstances giving rise to the offences which led to his licence being revoked. In addition no consideration appears to have been given to his contention that he could be accommodated by family well away from those to whom he was thought to be a risk
38. I accept that, in refusing an oral hearing, there was a failure by the decision maker to take account of a number of the guidance principles given in *Osborn*. I have particularly in mind 2(ii)(a) because there are clearly disputed facts as to the claimants alleged breach of the restraining order; 2(iii), the need to consider whether assessments and risks could benefit from closer examination, particularly in a case like this where the assessment of risk has changed to the prejudice of the claimant; and 2(vii), the need to exercise independence and impartiality and not be predisposed in favour of official accounts of events, or official assessments of risks over a case advanced by the prisoner.
39. It seems to me that the claimant was justifiably entitled to feel let down when the decision on his liberty was made without giving him the opportunity of putting forward his case.
40. I am satisfied that ground two is made out on the basis that there was a failure to consult the claimant by the COM before she came to her conclusion that he ought not to be released.
41. There is authority to confirm the importance of allowing input from the prisoner. In *Stubbs, R (On the Application Of)* [2021] EWHC 605 (Admin), UTJ Markus QC, specifically makes the point that it is important to consider the input of the claimant. At paragraph 29, the judge says:

> *"In this regard, it is important to note that the claimant had not engaged directly with prison staff, largely as a result of his frustrations with the situation at HMP Gartree*".
> *Whatever the reason, the effect of this was that his factual accounts, explanations or views were not available to officers when they prepared their reports. This made it all the more important that the Parole Board should have heard from the claimant before making either their finding of fact or risk assessments.*
> *A good illustration of why this was important is the report by the claimant's offender manager. The officer had assessed that the claimant was not suitable for release on licence due to issues in custody regarding behaviour, non-completion of Kaizen and lack of engagement with staff.*
> *The offender manager had not been able to discuss any of these matters with the claimant and had relied entirely on reports by others, including "numerous entries of negative behaviour in custody". Thus, the Parole Board was presented with a report based on disputed factual matters and assessments, with no effective input from the claimant.*
> *Moreover, the offender manager's recommendation was in part, based on the factual error that the claimant's tariff had not expired*".

42. I note that in *Stubbs*, it seems that there was an active decision on the part of Mr Stubbs not to engage. There is no evidence that Mr Pierpoint actively decided not to engage. It is just as likely that he was just simply not given the opportunity to engage.
43. The scenario in *Stubbs* is that the Parole Board was presented with a report based on disputed factual matters and assessments with no effective input from the claimant; in that respect it is similar to this case.
44. As regards ground three, "failure to give adequate reasons"; well, there are simply no adequate reasons. There is no indication of why the board member took the view that an oral hearing was not required. All he or she says is that they have carefully reviewed all the information and concluded that there was sufficient information to make a fair assessment, without explaining why that view was taken.
45. The least the claimant could expect is that the board member explain why he or she took the view that there was sufficient information to make a fair assessment, even though there was no input from the claimant or the POM. That has not been done.
46. I have not overlooked s31(2A) Senior Courts Act 1981. I note that neither the defendant nor the interested party has asked for consideration to be given to whether the outcome would have been substantially different if the application for an oral hearing had been fairly and lawfully considered. I note that CPR 54.8(5) suggests that s31(2A) need only be considered where the defendant requests that it be considered. as I have said, there is no such request.
47. Even if there had been however I would not have been satisfied that substantially the same decision would have been highly likely. On the contrary, on the basis of the paucity of information available to the board member it seems to me that an oral hearing would have been fixed if the request for one had been appropriately considered.
48. Accordingly, I quash the decision of 12 January.
49. The question is whether I should go on to make a mandatory order for the defendant to hold an oral hearing. I note that that was done in *Stubbs*. Mr Bimmier tells me that it has been done in many other cases as well. He argues that it is entirely appropriate on the basis that the

Court has found that the decision not to hold an oral hearing was unlawful. It therefore follows that it would be appropriate to order an oral hearing to take place.

50. S31(5)(b) enables the court to substitute its own decision for the decision in question but subject to the limitations imposed by s31(5)(A). Those limitations are that: (5A(a)- the decision in question must be that of a court or tribunal; (5A(b)- the decision has been quashed on the basis that there has been an error of law and (5A(c)-without that error there would have been the only decision the court or tribunal could have reached.
51. I am satisfied that the limitations imposed by s31(5A) do not preclude an order requiring an oral hearing. The requirements of (5A(a) and (b) are clearly met. I am satisfied that this is a case where, if the decision had been approached in the manner that was required, an order for an oral hearing would have been inevitable.
52. There is another dimension to this case which feeds into the decision as to whether to substitute this court's decision for that of the board where the jurisdiction to do so is not excluded by s31(5A).
53. The claimant's sentence expiry date is 5 December 2021. There is a risk that if this is simply remitted for reconsideration of an oral hearing the claimant may end up serving his sentence in any event, because reconsideration, and then, if necessary, an oral hearing, may not take place before his release date.
54. I accept that it is important that a person ought not to be incarcerated for longer than is necessary. If it is right for Mr Pierpoint to be released, and obviously I make no observations on that, then it is right that he is released as soon as it is appropriate and not simply, by effluxion of time.
55. Therefore, the order is that the decision of January be quashed and there is an oral hearing before the Parole Board.

End of Judgment

Transcript of a recording by Ubiqus
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This transcript has been approved by the judge