[2013–14 Gib LR 99]

LIVINGSTONE v. PAROLE BOARD and MINISTER FOR JUSTICE (Interested Party)

SUPREME COURT (Butler, J.): March 14th, 2013

Prisons—parole—judicial review—Parole Board's decision unlawful if procedurally unfair—prisoner has no entitlement to release on parole but right to proper consideration of case in accordance with legislation, common law and European law—unfairness includes (a) not telling prisoner of all evidence being considered; (b) perception of bias created by sole adverse witness serving on Board; and (c) failing to give adequate reasons for decision

The claimant applied for judicial review of the defendant's decision not to recommend his release on parole.

On July 25th, 2011, the claimant was sentenced to 2½ years' imprisonment for possession of cocaine with intent to supply. The probation officer had, at the time, recommended only a community service order, due in part to having apparently been misled as to the extent of the claimant's previous convictions. The claimant became eligible for consideration for parole on May 24th, 2012. His remission release date was March 25th, 2013. During his time in prison he had been a model prisoner, impressing everyone with his attitude and conduct.

The claimant was informed of his first parole hearing nine days before it took place, in April 2012. He was interviewed by the probation officer (as a member of the Board) prior to the hearing, who reported back to the Board; the report of the interview was not given to the claimant, nor was he informed of any material the Board would be considering other than that which he had provided himself. He was not informed of his right to representation.

During the April hearing, the claimant was asked whether he would attend a rehabilitation centre (which he agreed to) and whether he thought an error in his sentence (the Board incorrectly thought he was supposed to have been sentenced to 3½ years) should be taken as his parole instead. The Board also raised the issue of a spent conviction from 2000. It

declined to recommend releasing the claimant and did not give any reasons.

The claimant's next parole hearing was in October 2012. No further material was put before the Board. He was not interviewed again and was given only a few days' notice of the hearing. He was not informed of any material the Board would be considering other than that which he provided himself, or informed of his right to representation. The Board again declined to recommend releasing the claimant and did not give any reasons.

Following the October hearing, the claimant sought legal advice, and his solicitors obtained the minutes of the April and October meetings. The only reason given for not recommending his release was a single sentence in the October minutes concerning the risk of his using drugs again. The Board agreed to hold a fresh hearing on November 30th, 2012. Due to the small number of Board members and the statutory requirement that one of the three members on a panel be a probation officer, it was not possible to grant the claimant's request that the new Board did not consist of the same or largely the same people as before.

The parole officer's report was disclosed to the claimant, and it contained negative comments about the claimant which, counsel for the claimant suggested, were inconsistent with his positive pre-sentencing comments. Without informing the claimant, the Board sought the probation officer's comments on those observations—which they received—and invited further submissions from the claimant, which were received on December 11th. The claimant's lawyers wrote to the Board again on December 20th, having heard nothing, and were copied into an email stating that the Board would again not be recommending the claimant's release and that reasons would follow in January 2013. When an official response was received, dated January 3rd, 2013, there was only a single sentence of reasons, almost the same as that given in the October minutes. There was no indication of any evidence used to support the Board's conclusion, or of consideration of the claimant's submissions or excellent references, or that the balancing exercise required by the Prison Act 2011 had been carried out. When asked for full minutes of the December meeting and the correspondence with the probation officer, the Board provided only altered and redacted minutes. The correspondence with the probation officer was an email in which he defended the integrity of the Board, rather than addressing counsel for the claimant's points about the inconsistency of his reports.

The claimant applied for judicial review of the December decision not to recommend his release on parole. He submitted that the decision of the Board was unlawful as there was procedural unfairness in that (i) the claimant did not receive a fair hearing, as the Board did not approach the matter afresh, and therefore although the November hearing was an oral hearing at which he was legally represented, supplied with copies of all the documents the Board would be considering and re-interviewed, the unfair April and October hearings were influential, as demonstrated by (a)

the overlap in Board members; (b) the Board's taking into account evidence and considerations from the unfair April and October hearings; (c) the Board's setting too high a standard for the claimant to meet, *i.e.* that he had to displace the view formed at the unfair April and October hearings; and (d) repeating verbatim the probation officer's original report in the minutes and later in the reasons, despite failing to inform the claimant that it would be taken into account; (ii) the Board was open to the perception of bias because of the dual role of the probation officer as Board member and sole adverse witness, a view reinforced by the use of words from the probation officer's report in the Board's reasons, and the defence of the Board's integrity given by the probation officer in response to questions raised about his report made *qua* probation officer; and (iii) the reasons given were inadequate.

In reply, the defendant submitted that (i) whilst there were errors made in the handling of the April and October hearings, at the November hearing the matter was approached fairly and afresh; the words in the December minutes indicating that the standard had been set too high had a more innocuous meaning than the claimant suggested; (ii) the probation officer did not take part on the decision-making process as such; and (iii) despite the indefensible altering and redacting of the December minutes, and the inadequate reasons given in the October minutes and January 3rd letter, the application should be dismissed as the reasons had been clarified and supported in a further statement from the Board, filed in the past week.

Held, granting the application:

(1) The Board's decision that the claimant was likely to re-offend if it recommended his release on parole was within the ambit of the proper conclusions the Board could reach. Release on parole was not a statutory right, but a matter for the Board's discretion, to be exercised in accordance with the rules of natural justice and the statutory test. The court's disagreeing with the decision of the Board was not in itself a ground for granting an application for judicial review (para. 20; para. 33).

(2) There had been sufficient procedural unfairness in the way the Board had dealt with the claimant's case as to render its decision unlawful. Though release on parole was not a right, proper consideration of release on parole in accordance with the legislation, common law and European law was. Taken together, the following factors made the Board's decision unlawful:

(i) The November hearing did not provide the claimant and his counsel with sufficient opportunity to present their submissions. The Board should have informed the claimant if it had before it the probation officer's report from the April or October hearings. It was also reasonable for the claimant to assume that the Board's correspondence with the probation officer did more than raise matters already before it. The December minutes made specific reference to the October hearing, and indicated that the Board set the standard too high by deciding that it was for the claimant to convince

it to depart from its earlier position, rather than hearing the claimant's case on its merits. The strict interpretation of the wording in the minutes alone would not, however, be sufficient for the application to be granted.

(ii) The Board was open to the perception of bias. A tribunal was required not only to be actually impartial, but also to be so in a way that the ordinary observer would have no doubt about its impartiality. It was unfortunate, therefore, that there was only one probation officer available and that the Prison Act 2011 required the Board to have a probation officer on it. Whilst there was no actual bias on his part, given the unfortunate constitution of the Board, it was required to set out its reasons more fully than in normal circumstances.

(iii) The reasons it had given for not recommending the claimant's release on parole were inadequate. Prisoners had to be given clear and adequate reasons for not recommending their release, which might be brief in appropriate cases, but must make it clear whether the claimant's submissions had been taken into account, whether they had been accepted, what findings had been made, and whether the statutory balancing exercise had been carried out (though this might be inferred). Reasons given after the start of judicial review proceedings should be treated with caution. The one-sentence reasons given in the October minutes and January 3rd letter were indefensible, as was the altering and redacting of the December minutes. The additional statement detailing the Board's reasoning, made after the start of the present proceedings, contained no indication that the claimant's good behaviour, the suggested conditions to be attached to his release, or the support he would have from his family, had been fully taken into considered. In normal circumstances, the court would be reluctant to conclude from their absence in such a statement alone that they had not been fully taken into account but, on this occasion, the Board had fallen short of the standard expected of it (paras. 23–37).

(3) The following lessons could be learned from this case: (i) the prisoner should always be told the date of his parole hearing and informed of his statutory rights; (ii) he should be informed of all material the Board would consider; (iii) unless the case for or against recommending release was overwhelming, an oral hearing should be considered when there were likely to be factual disputes, or when the weight accorded to certain matters might be affected by an oral hearing; (iv) a probation officer should generally not both interview and report on the prisoner, and take part in the decision-making process; (v) the prisoner should be given reasons for an adverse decision, though they might only need to indicate that his submissions had been taken into account but outweighed by the risks of recommending release, and that the relevant factual disputes had been decided; and (vi) the Board might be advised to consider whether it would be happy to rely on the reasons given, if the decision were subject to judicial review (para. 38).

Cases cited:
(1) *El-Farargy* v. *El-Farargy*, [2007] 3 F.C.R. 711; (2007), 151 S.J.L.B. 1500; [2007] EWCA Civ 1149, considered.
(2) *Lawal* v. *Northern Spirit Ltd.*, [2004] 1 All E.R. 187; [2003] I.C.R. 856; [2003] I.R.L.R. 538; [2003] H.R.L.R. 29; [2003] UKHL 35, distinguished.
(3) *Porter* v. *Magill*, [2002] 2 A.C. 357; [2002] 2 W.L.R. 37; [2002] 1 All E.R. 465; [2002] H.R.L.R. 16; [2001] UKHL 67, considered.
(4) *R. (Smith & West)* v. *Parole Bd.*, [2005] 1 W.L.R. 350; [2005] 1 All E.R. 755; [2005] UKHL 1, distinguished.

Legislation construed:
Prison Act 2011, s.53: The relevant terms of this section are set out at para. 20.
Schedule 1, para. 1: The relevant terns of this paragraph are set out at para. 20.

Ms. G. Guzman, Q.C. and *Ms. C. Pizarello* for the claimant;
R.R. Rhoda, *Q.C.*, *Attorney-General* and *K. Drago*, *Crown Counsel*, for the defendant;
J.J. Neish, *Q.C.* for the Minister for Justice.

1 **BUTLER, J.:** This is an application for judicial review of the decision of the Parole Board made following a hearing on November 30th, 2012 not to grant the claimant parole. I granted permission last week without opposition and listed the application urgently in light of the applicant's imminent release irrespective of its outcome. I am conscious that I have not covered all of the points made at the hearing. I have not, for example dealt with the detailed submissions concerning the parties' respective attitudes to Bruce's Farm. Though I heard submissions in this matter last Friday, there was insufficient time for me to deliver my judgment. I now do so on an *ex tempore* basis, given the urgency. I have, however, considered the detailed submissions before me, the bundles of authorities, the bundle of documents and the various other documents handed to me during the hearing. Though this is not a reserved judgment, I do observe that this is a case from which I hope that lessons may be learned.

Background facts

2 On July 25th, 2011, the claimant was sentenced to 2½ years' imprisonment for possession of cocaine with intent to supply. The court took into account a probation report prepared by Mr. Bell, in which he recommended a community service order. It seems that he was unaware that the claimant had previous convictions, and had seen neither the claimant's antecedents nor the prosecution summary. That scenario was unfortunately all too common at that time. I am told that Mr. Bell had not asked for those documents. The defendant apparently mentioned to him

that he had no previous convictions for possession of a Class A drug with intent to supply, but did not volunteer (there is no evidence that he was asked) that he had previous convictions for minor offences of possession of cannabis. It does seem that he volunteered that he had many convictions for driving offences, and this may have led Mr. Bell to assume that he did not also have other convictions. His antecedents were, of course, known to the sentencing judge. They included offences of burglary and other offences of dishonesty. In fact, they do not appear to include many motoring offences, and he had served a short prison sentence. He did tell Mr. Bell that he had been taking drugs since he was 17.

3 The claimant became eligible for consideration for parole on May 24th, 2012, having served one-third of his sentence. Since then the Parole Board ("the Board") has considered his case on three occasions: in April, October and November 2012. Nine days prior to the April meeting, Mr. Bell (who was the probation officer member of the Board) interviewed the claimant, who was told for the first time the date of the meeting. Mr. Bell reported to the Board following the interview, but the claimant was not provided with a copy of his report—or any other material considered by the Board—save as was submitted by him. He attended the meeting, but was not told of his right to representation. The material presented in support of the claimant was substantial and impressive. It indicated not only that the claimant had been of good behaviour in prison, but that his behaviour had been exemplary. The prison superintendent and prison officers supported his case. He had effectively tested negative for drugs and had worked hard. He had readily undergone counselling and had impressed everyone. He was a model prisoner, given special privileges. His attitude and conduct had, it seems, impressed everyone inside and outside the prison.

4 I am told that during the meeting, the claimant was asked (a) whether he had considered Bruce's Farm [a rehabilitation centre] (he agreed to attend Bruce's Farm but the arrangements which he was told would be made never materialized); and (b) whether he felt that a purported error in his sentence (it being thought that he should have been given a longer sentence) should be taken as his parole instead. The latter question, if asked, was quite extraordinary and indicated that the Board might be taking into account an entirely irrelevant matter which was, in any event, incorrect. There had been a mistake in the sentencing judge's remarks, indicating a sentence of 3½ years, but she had corrected that error on the following day. There was no justification for the suggestion that the sentence should have been longer than it was. The learned judge set out her reasoning very clearly.

5 The Board also raised the issue of a spent conviction dating back to 2000. It declined to release the claimant, and fixed its next meeting to

consider his position in October, 2012. The claimant was given no reasons.

6 At the October meeting, there was no further material adverse to the claimant. The positive material was unchanged (and indeed fortified by the passage of time). Mr. Bell had not interviewed him again. Again, the claimant was given only a few days' notice of the hearing and was not informed of what documentation and information the Board was considering, other than that which he had provided. Again, the claimant had not been informed of his right to representation. Again, he was told (by letter dated November 5th) of the decision not to recommend parole. Again, no reasons were given.

7 Unsurprisingly, the claimant was disappointed. He consulted solicitors, who sent a letter of claim to the Board and the Minister for Justice. On November 15th, the Board sent to the claimant's solicitors copies of the minutes of the April and October meetings. The only indication of reasons for their decisions appeared in the October minutes, and was expressed in a single sentence: "The Members of the Board unanimously agreed that the inmate has a tendency to be dismissive and has a high risk of relapsing; he is not accepting the risk he could face once he is released."

8 The claimant filed a judicial review application on November 16th, and on November 20th, 2012, the Board, through Crown Counsel, offered a rehearing at which the claimant's case would be reconsidered on its merits, with all information relevant to the case being provided, and the claimant having the opportunity to be legally represented. In their reply, the claimant's solicitors sought a new, independent Board panel who could consider the matter afresh, but on November 22nd, Crown Counsel made it clear that the composition of the panel would probably largely comprise the same members.

9 There was indeed a problem. In Gibraltar there are a limited number of members of the Board. The quorum for a hearing was three. A further problem arose because Mr. Bell was the only probation officer, and the Prison Act required that there be a probation officer member of the Board.

10 The claimant's application for permission to apply for judicial review came before the Chief Justice on November 23rd. The claimant decided to accept the offer of a rehearing, to take place on November 30th. On that basis his application was dismissed, although I am told that the Chief Justice indicated that but for that offer he would have granted permission.

11 On November 27th, the Board provided further documentation, including a parole report with very positive comments about the claimant, confirming that he would be very suitable for any job of a manual nature, and that despite his prison record "he is a trustworthy individual."

12 In response to Ms. Guzman, Q.C.'s request dated November 27th, a copy of Mr. Bell's report was provided on the 28th. She represented the claimant at the November 30th hearing, and provided written submissions. Mr. Bell was not present. She pointed out that Mr. Bell's negative report seemed inconsistent with his earlier pre-sentence report.

13 Following that hearing, the Board decided—without first informing the claimant or his lawyers—to obtain Mr. Bell's comments on Ms. Guzman's submissions. Mr. Bell responded and, on December 5th, the Board informed the claimant's lawyers that they had discussed the matter with him and invited further submissions, which were duly sent on December 10th, and acknowledged on the 11th. Time was marching on. The claimant's remission release date was March 25th. In the absence of any response by December 20th, the claimant's solicitors wrote again. The response was unfortunate. Ms. Guzman was simply copied into an email from the Board's legally qualified member to the Board's secretary, which could be taken as expressing some irritation:

> "Gillian should be told that the decision is that parole has not been agreed and that the reasons for that decision will follow. If she does not like that then let her take whatever action she deems appropriate. The reality is that the courts are essentially closed now until the New Year."

The claimant's solicitors replied the next day expressing concern, but no official response was received until January 4th, 2013 (letter dated January 3rd).

14 Given the background which I have mentioned, the letter was remarkably lacking in reasoning. As with the reasons given for the October decision, they were expressed in a single sentence: "The Board unanimously agreed that you still appear to be dismissive, and you are not facing the high risk of relapse, you do not accept the high risk of relapse, you do not accept the risk you could face once you are released." There was no indication of the evidence relied upon to support that conclusion, or why the Board had reached it. Nor was there any mention of the detailed written and oral submissions which had been made by Ms. Guzman and the glowing references provided on the claimant's behalf. No indication was given that the balancing exercise required by the Prison Act had been performed and no sufficient information from which the claimant could understand properly and fully why his case had been rejected.

15 The Board's action following this was again unfortunate. In a case in which dissatisfaction had been expressed strongly by and on behalf of the claimant, and in which concern had been expressed about the impartiality of the Board as composed, when asked for full minutes and correspondence between the Board and Mr. Bell they provided only redacted minutes. No explanation was given. This was bound to cause suspicion.

Mr. Rhoda was unable before me to give any explanation. I should mention that the Attorney-General has acted with propriety in obtaining and disclosing un-redacted minutes but these were only supplied in part just before the hearing of the claimant's application for judicial review and partly during the hearing (not as a result of his fault). It transpires that the minutes were not simply redacted but also had been altered prior to disclosure.

16 Not until January 23rd, 2013 was a copy of an email from Mr. Bell to the Board's chairman disclosed. In it he saw fit to set out a defence of the Board's integrity rather than answering Ms. Guzman's points.

17 Realistically and properly, Mr. Rhoda did not seek to defend the one-sentence reasons or the redaction of the minutes. In my view they were, on the information before me, indefensible in that form.

18 Mr. Rhoda says that, nevertheless, the application for judicial review should be dismissed, since the reasons have been clarified and fully supported in the statement of the Board's chairman, filed only last week. Ms. Guzman did not object to my reading and taking into account that statement. Indeed, she relies upon it as confirming that the Board's approach has been procedurally and in substance unfair.

The law

19 The legislative provisions relating to parole are contained in ss. 52–61 of the Prison Act 2011. I have been referred to a number of judicial precedents relating to judicial review, generally and specifically concerning parole, which I have considered fully.

20 In considering this application I apply the following principles:

(i) Release on parole is a matter for the discretion of the Board, exercising that discretion properly and in accordance with the rules of natural justice and applying the statutory test set out in Schedule 1, para. 1 of the Act. Though the final decision is that of the Minister for Justice, he is bound to follow the recommendation of the Board (save for exceptions which do not apply in this case). Release on parole is not a right in itself but proper consideration of it in accordance with the legislation, common law and European law is a right.

(ii) This is not an appeal. That I may disagree with the Board's decision is no ground for judicial review. I must guard against substituting my own decision for that of the Board. Only if (a) the decision is shown to be one which could not reasonably have been reached by the Board or is irrational (and is therefore outside the generous ambit of its discretion); (b) the Board is shown to have taken into account material which is irrelevant or to have failed to take into account material which is relevant; (c) it is shown that there has been procedural unfairness such as to render

the decision unlawful; or (d) bias or apparent bias is shown by the claimant, can the application succeed. The burden is on the claimant.

(iii) The Board may regulate its own procedure. Again, there is a broad discretion, to be exercised within similar bounds.

(iv) Section 53 of the Act provides that:

> "(2) The Parole Board shall deal with each case on consideration of any documents given to it by the Superintendent and of any reports it has called for and any information, whether oral or in writing, that it has obtained.
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> (3) If in any particular case the Parole Board thinks it necessary to interview the person to whom the case relates before reaching a decision, the Parole Board may itself interview such person or request one of its members to interview him, and shall take into account the report of that interview.
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> (4) The person to whom a case being dealt with by the Parole Board relates shall have the right—
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> (a) to be legally represented and to make any representations to the Board about his case that he wishes to make; and
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> (b) to receive information relevant to the case,
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> under such conditions as may be prescribed.
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> (5) In deciding whether to advise the Minister to release a prisoner on licence under section 54, the Parole Board shall take into account the matters set out in—
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> (a) paragraph 1 of Schedule 1, if the person is serving a sentence for a determinate period
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> . . .
>
> (6) The Parole Board shall consider each case on its own merits without discrimination on any grounds."

(v) Schedule 1, para. 1 provides that—

> "(1) In deciding whether or not advise the Minister to release on licence a prisoner serving a sentence for a determinate period the Board shall:
>
> (a) consider primarily the risk to the public of a further offence being committed at a time when the prisoner would otherwise be in prison and whether any such risk is acceptable and this must be balanced against the benefit, both to the public and the prisoner, of early release back into the community

under a degree of supervision and which might help rehabilitation and so lessen the risk of re-offending in the future (my emphasis); and

(b) take into account that safeguarding the public may often outweigh the benefits to the prisoner of early release.

(2) Before advising the Minister to release a prisoner on licence, the Parole Board shall consider the following factors and information, where relevant and available, recognizing that the weight and relevance attached to particular information may vary according to circumstances—

(a) whether the safety of the public would be placed unacceptably at risk and in assessing such risk the Board shall take into account—

(i) the nature and circumstances of the offence including any information provided in relation to its impact on the victim or victim's family;

(ii) the prisoner's background, including the nature, circumstances and pattern of any previous offending;

(iii) whether the prisoner has made positive and successful efforts to address the attitudes and behavioural problems which led to the commission of the offence;

(iv) the prisoner's attitude and behaviour to other prisoners and staff;

(v) the prisoner's awareness of the impact of the offence, particularly in relation to the victim or victim's family, and the extent of any demonstrable insight into his attitude and behavioural problems;

(vi) behaviour during any temporary release or other outside activities;

(vii) any risk to other persons, including the victim, their family and friends;

(viii) any medical, psychiatric or psychological considerations relevant to risk (particularly where there is a history of mental instability); and

(iv) that a risk of violent or sexual offending is more serious than a risk of other types of offending;

(b) whether the longer period of supervision that the release on licence would provide is likely to reduce the risk of further offences being committed;

(c) whether the person released on licence is likely to comply with the conditions of his licence and the requirements of supervision, taking into account occasions where he has breached trust in the past or in considering re-release any previous breaches of licence conditions;

(d) the suitability of home circumstances;

(e) the relationship with the supervising probation officer;

(f) the attitude of the local community in cases where it may have a detrimental effect upon compliance; and

(g) representations on behalf of the victim in respect of licence conditions."

(vi) The Act does not give the inmate a right to an oral hearing. Nor does it confer a right to be given reasons for the Board's decision. Nor a right to parole. Nevertheless, at common law, or by virtue the European Convention on Human Rights or the Gibraltar Constitution, it will often be unfair and unlawful not to grant the rights to a hearing and reasons. Each case is fact sensitive and what is reasonable will depend on its own circumstances. The Board's discretion is wide.

(vii) There will no doubt be circumstances in which the Board could reasonably decide that an oral hearing is unnecessary (for example where it is clear that no useful purpose would be served, perhaps because the inmate has committed numerous offences whilst serving his sentence and has not put forward any positive matters in interview or in writing). There are features of the Board's function which will in fairness often require an oral hearing before deciding not to grant parole. Mr. Rhoda accepted that such features are present in this case. The decision involves liberty of the person, is quasi-judicial, is of great importance to the prisoner on the one hand and society on the other and there is no right of appeal. If there are relevant disputes of fact, an oral hearing will usually be necessary.

(viii) It is more difficult to envisage circumstances in which it would be reasonable not to give reasons. The Board's decisions are subject to judicial review. For that to have real meaning, it is generally necessary for there to be openness in its decisions and that the prisoner should be given clear and adequate reasons for a decision not to recommend release. Reasons may be brief, so long as they are clear. In clear cases they may be very brief indeed. Even in others the Board should not be expected to give a full, lengthy judgment. But the reasons should be sufficient to make it clear the prisoner's submissions have been taken into account, whether they have been accepted (and if not, why not), what findings of fact have been made (and on what evidence), and that the statutory balancing exercise has been carried out. In some circumstances a few sentences (or even a single sentence) may suffice. It may be inferred that the statutory

exercise has been carried out. This court should not be persuaded to examine the reasons with a fine tooth comb or to analyse them over-technically, or to examine the wording over semantically. It is sufficient if the reasons are generally clear, adequate and justifiable. It is, however, often a helpful exercise for the decision-makers themselves, in a more difficult or finely balanced case, to formulate reasons before reaching a final conclusion.

(ix) The prisoner is entitled to know what material has been put before and/or considered by the Board and he and/or his legal advisers should know sufficient to establish that the rules of natural justice (the "*Wednesbury* Rules") have been satisfied. The common law in these respects is reinforced by art. 6 of the ECHR, and by the Gibraltar Constitution.

(x) As to actual or apparent bias, the law is contained in the well-known cases of *Porter* v. *McGill* (3) and *El-Farargy* v. *El-Farargy* (1). It is clearly necessary that the Board be independent and impartial. The tribunal must not only be truly independent and free from actual bias; it must also appear in the objective sense to have those essential qualities. The test is what the ordinary observer would think and whether he would have any doubt about the impartiality of the tribunal.

(xi) Reasons or further reasons supplied after commencement of judicial review proceedings should be examined carefully and with some caution (and in some cases scepticism). There may be a conscious or sub-conscious desire to bolster the decision and the original reasons (or lack of reasons) given.

This case

21 Mr. Rhoda rightly concedes that there were errors in the way the claimant's case was dealt with by the Board in relation to the April and October hearings. Given the positive support which he had for release, and all the circumstances (which I need not set out fully since the point is conceded and I am dealing with an application for review of the December decision), the claimant should have been advised of his right to legal representation and should have been offered an oral hearing at which he could be represented. He should have been given reasons for the April decision; the single-sentence reasons for the October decision were inadequate. He should have been given the opportunity to answer the Board's misgivings, orally if he so wished. The recently disclosed April minutes show that Mr. Bell had been questioned by the Board's chairman in the absence of the claimant and without his knowledge. Mr. Bell's responses were not communicated to the claimant.

22 That is why the offer of a rehearing was made. It is important that the offer was for rehearing, rather than simply a further hearing or reconsideration. I am told by Ms. Guzman that it was made clear that the Board

gave its assurance that it would be an entirely fresh hearing without regard to anything which had happened before. Of course regard would have to be had to information placed before the Board for the fresh hearing which may also have been before them previously but nothing would be considered which was not put before the Board at the November hearing. It may be thought that it would be difficult for the Board to put out of its mind what it had heard before. The claimant, however, was entitled to and did waive his insistence upon a differently constituted Board. There was particular cause, however, for the Board in these circumstances to conduct itself in all reasonable respects in such a way as to reassure the claimant that they were able to and did put previous information and decisions out of their minds.

The grounds

Procedural unfairness

23 The Board did hold an oral hearing. The claimant has been represented admirably by leading counsel, who presented written submissions to the Board and made oral representations at the hearing in November. The Board supplied copies of all documents which they had for that hearing. The defendant was interviewed again by Mr. Bell, whose report was disclosed. It is true that he was not at the hearing but no request had been made for him to be present for cross-examination and no request was made at the hearing for him to be called for cross-examination.

24 It is suggested that the Board did not approach the matter afresh, as had been promised. This, says, Ms. Guzman, is apparent from (a) the overlap of personnel; (b) their having taken into account evidence received and considered in April and October in unfair circumstances; (c) their having approached the matter on the basis that it was for the claimant to do sufficient to displace their previous decisions. She points to the minutes of the December 18th meeting recording that the Board's view had "remained" as it was before. She complains that the minutes indicate that the claimant was required to "convince the Board sufficiently" regarding his risk and submits that this indicates that they had reached an adverse view prior to hearing the claimant's case and that the threshold was set too high; and (d) that Mr. Bell's previous parole report was repeated verbatim in the minutes and the reasons communicated in the January 3rd letter shows that they took into account that report, though no indication had been given to the claimant that they had that report before them or were taking it into account, contrary to their previous assurance. The negative views about the claimant expressed by Mr. Bell related only to his pre-sentence conduct and general statistical statements about the reoffending rate of drug addicts (though Mr. Bell recognized that the claimant's

conduct in prison had been good). The October minutes again recited Mr. Bell's phraseology, as do the reasons set out in the January 3rd letter.

25 I can see no reason why the Board should decide not to seek Mr. Bell's response to the points made in Ms. Guzman's submissions, and in particular, her comments on the apparent inconsistencies between his report for the November hearing and his pre-sentence report. I remind myself that the Board may decide its own procedure. It is however unfortunate, a hearing having taken place, that this was not done by way of urgent resumption of the hearing so that Mr. Bell could express his views orally in the presence of the claimant and his lawyers, and could be cross-examined by them, particularly given the previous background and the urgency of the situation. The Board rightly offered later the opportunity for cross-examination of Mr. Bell, but commented that this would be likely to cause additional delay. In the light of that prospective delay, the claimant did not press for cross-examination. Even without such further delay, the claimant received no reasons until January 4th, and no notification of the decision until December 20th. It was nevertheless a matter of considerable concern for him and Ms. Guzman.

26 Ms. Guzman emphasizes the dual role of Mr. Bell, as member of the Board and as sole adverse witness. The Board claims that he did not take part in the decision-making process as such, but the December 5th minutes record his attendance as a Board member, and his response to Ms. Guzman's letter contains fairly strident criticism of her points and a defence of the Board's impartiality. It is not surprising in these circumstances that it is suggested that there is an appearance of Mr. Bell effectively acting as part of the Board and inevitably being biased in his own favour as sole adverse witness. I have every sympathy for Mr. Bell. The Act requires there to be a probation officer member. There was only one probation officer. The Act provides that the Board may ask one of its members to interview the prisoner. I find no actual bias on his part, and Ms. Guzman realistically does not press for such a finding. She submits, however, that that the case of apparent bias is clear. It was regrettably reinforced by the one-sentence reasons given in Mr. Bell's words without further explanation, and by the later revelation (post-decision, in January) that Ms. Guzman's written representations in her letter dated December 10th had been put to Mr. Bell, who had commented on them adversely.

27 Given the terms of the reasons in the December 3rd letter, the claimant naturally assumes that Mr. Bell's evidence was crucial. Ms. Guzman also points out that the claimant's right under s.53(4)(a) of the Act is of no effect if the claimant is not informed of key evidence against him.

Duty to give reasons/adequacy of reasons

28 Mr. Rhoda concedes that the reasons as presented in the January 3rd letter are insufficient. He relies on the witness statement of the Board's chairman as showing that the Board carried out its decision-making exercise fairly, independently, afresh, in accordance with its statutory and common law duties.

29 It is not unusual for reasons to be set out or supplemented in evidence filed in judicial review proceedings. Indeed, the court will expect a defendant to assist it by setting out its case fully. That particularly applies in circumstances in which there was no duty to supply reasons when giving or making a decision. I am bound in the particular circumstances of this case to approach Mr. Gordon's statement with caution. I do accept that at the November 30th hearing, Ms. Guzman and the claimant were given every opportunity to present their views and submissions. If (and for these purposes I propose to accept this) the Board had before them any report of Mr. Bell which had been presented to them in April or October, that fact should have been revealed to the claimant.

30 I cannot ignore the Board's subsequent, unexplained, decision to redact the minutes prior to disclosure to the claimant and, perhaps more importantly, to alter them without informing the claimant that they had been altered. There must be reason to be suspicious as to the reasons for this action, especially since the previous minutes had been disclosed without such redaction.

31 Mr. Gordon claims that the matters raised in Mr. Bell's email were either matters already raised or, in the view of the Board, did not add anything of note. That may or may not be so but I find that it is reasonable for the claimant to suspect otherwise, given the way in which his case has since been dealt by the Board.

32 Taken at face value, the minutes of the December 18th meeting do suggest that the Board decided that it was for the claimant to convince it that it should alter its previous decisions. But for the other surrounding circumstances of this particular case, I should not have granted the application for judicial review on the basis of strict interpretation of the Board's wording recorded in those minutes. It does seem strange to me, however, if the words were intended to mean what Mr. Gordon suggests in his statement, that it was considered necessary to include them at all, they adding nothing and being nothing but a statement of the patently obvious. The wording in his statement is not the same as that in the minutes and is significantly more innocuous. Indeed the minutes specifically refer to the Board not having changed its view of the inmate since the meeting of October 23rd. He does also say that the minutes do not properly reflect that the issue the Board was considering was whether the claimant would re-offend if released on licence. The minutes also record that the Board

was minded to conclude that the inmate had not changed (since when? Ms. Guzman submits that the only sensible meaning is that reference is being made to change since the previous hearings). Specific reference is made to the October hearing.

33 On its own I would not criticize the Board's conclusion that the claimant was likely to re-offend or fail to "realize the seriousness of his offence and not re-offend" whilst under supervision, whether or not that is a conclusion which I would have reached in the Board's position. I was not present when the claimant was questioned and gave evidence and do not have the opportunity of assessing him as they did. It is a conclusion, I find, within the ambit of proper conclusions for the Board to reach. Ms. Guzman's submissions were forceful and would no doubt have convinced some but that is not the test.

34 It does not instil confidence to be informed that the minutes are inaccurate on important issues, such as whether the Board was considering whether the claimant would reoffend after his licence expired in March 2013. The minutes also record, seemingly inaccurately, that the claimant was sentenced for importation of drugs.

35 More difficult is the issue of whether the Board properly performed the balancing exercise required by the Act. It is not necessary for it to quote the Act or to mention every item in its statutory list for consideration. It was, however, in the particular circumstances of this case, necessary to set out clearly (if not in detail) what parts of the claimant's submissions and evidence it accepted and what positive features it was placing in the balance. A clear summary would have sufficed. Mr. Gordon's statement does appear to minimize the claimant's exemplary prison conduct and progress (which were not merely "adequate"). He does not mention the conditions of release which had been suggested by Ms. Guzman and why it was thought that they would not reduce the risk sufficiently. Nor does it mention the claimant's home circumstances and the support he had there. Despite all those matters, in other circumstances I should be reluctant to conclude that the Board had not taken such matters into consideration properly and fully. It was entitled to put public safety first and to say that, though it accepted the various positive features (it should say which it did not accept) they had decided that the risk was too great to balance out the benefits to the claimant and to society of releasing him.

36 Taking the above circumstances as a whole, I find with some reluctance that there has been procedural unfairness in the way this claimant's case had been dealt by the Board. The possible appearance of bias is part of that procedural unfairness. Though I do not criticize the composition of the Board, it was unfortunate that it could not be differently constituted. Such problems arise frequently in a jurisdiction as

small as Gibraltar, but they do mean that particular effort must be made to ensure that everything reasonably possible is done in such circumstances to ensure that everything is done and seen to be done openly and with actual and perceived procedural fairness. On this occasion, the Board has fallen short of the standard to be expected of it. It was incumbent upon it to set out its reasons rather more fully than might have been required in normal circumstances. The unfairness has, in my judgment been such as to render the Board's decision unlawful.

37 I have listened to the eloquent submissions of the Attorney-General and considered the authorities to which he has referred (in particular, but not only, *R. (Smith & West)* v. *Parole Bd.* (4), *Lawal* v. *Northern Spirit Ltd.* (2), but in my view this case is unique and distinguishable from those cases for the reasons which I have given above.

Lessons

38 It seems to me that the following lessons may be learned, though as this is not a reserved judgment, my comments must not be elevated to the status of guidance which can be relied upon in future cases. They are not intended to be exhaustive or comprehensive:

(i) in all cases, the prisoner should told of the date when his case for parole will be considered and should be informed of his statutory rights;

(ii) the prisoner should be informed of all documents and information which the Board will consider;

(iii) if there are likely to be any factual disputes or matters which may be given more or less weight if oral evidence were heard, an oral hearing should be considered and, unless the case against or for release is overwhelming, should take place;

(iv) a probation officer who interviews the prisoner and reports to the Board should generally not form part of the actual decision-making process;

(v) following the decision, reasons should be given to the prisoner, at least if it is adverse to him. The detail required in such reasons will differ from case to case and in many cases may only need to indicate that all that the claimant has said has been taken into account but that the Board considers, for the following summary of reasons, that the risks of early release outweigh the advantages. Any factual disputes should be determined unless they have no effect on the decision. When there has been a full hearing at which genuine detailed submissions are made on behalf of the prisoner, care should be taken to avoid the impression that they have not been considered properly and given due weight; and

(vi) it may be advisable to have in mind whether the Board would be happy to rely upon the reasons as given, in the event of a subsequent application for judicial review.

39 I have not indicated conclusions as to what is the appropriate remedy. The normal remedy would be quashing of the Board's decision and referral to a differently constituted Board for rehearing, but that would be of little benefit in this case, given the time-scale. I could make declarations (although the terms of this judgment set out my overall findings and conclusions). I have the power to make a mandatory order requiring the Board urgently to rehear the matter in the light of my findings, or even to recommend the prisoner's release. I shall consider the appropriate remedy when I give my judgment this coming Thursday. I shall cause these notes of judgment, imperfect though they are, to be copied to counsel for the parties on the usual terms that their contents must not be revealed to third parties until I have formally given judgment. In the meantime, I earnestly hope that in the exceptional circumstances of this case the Board, with the benefit of the legal advice available to it, will feel able to reconsider the claimant's case in the light of my findings and to take a pragmatic view, given that the claimant does have some legitimate grievance and is due for release in about two weeks' time. There may still be time for benefit to be gained from a very slightly early release now, on strict conditions, and with a view to starting the claimant on the best possible course to avoid a return to drugs or reoffending, with the support of his apparently supportive family. He would indeed be foolish to break such conditions within so short a period, and the Board may well feel that in the circumstances the risk of his doing so would now be one worth taking when balanced against the advantages, especially taking into account the glowing support expressed in the documents before the Board from a wide range of witnesses.

40 To the extent that it is necessary, in order that the Board may consider the situation in the light of the above, I relax the usual embargo on use of this draft judgment.

Application granted.