[2015 Gib LR 91]

R. v. PAROLE BOARD (J.L.G. GARCIA and J.D.T. GARCIA, Interested Parties)

SUPREME COURT (Dudley, C.J.): December 22nd, 2014

Prisons—parole—residence outside jurisdiction—prisoners to be subject to supervision condition when released on parole even if propose to reside outside jurisdiction notwithstanding enforcement problems—enforcement problems to be taken into account as part of balancing exercise under Prison Act 2011, Schedule 1, para. 1(1) as stated in para. 1(2)(c)

The Minister for Justice applied for advice under s.54(5) of the Prison Act 2011 in response to the Parole Board advising the release on parole of the two interested parties.

The two interested parties were prisoners who had been sentenced to 4 years' imprisonment for offences including possession and importation of 500 kg. of cannabis resin and operation of a fast launch without a licence.

After spending 18 months in prison, the Parole Board recommended that both prisoners be granted early release under parole licence. The draft licence supplied by the Board did not contain a supervision condition because both prisoners intended, subject to being granted permission from the Minister for Justice under s.57(2) of the Prison Act 2011, to live outside Gibraltar on their release and the Board assumed that they could not be made subject to a supervision condition in those circumstances.

Held, allowing the applications:

(1) The Parole Board's assumption that, because upon release on licence the prisoners would leave the jurisdiction, they could not be made subject to a supervision condition as part of their parole licences was incorrect. To release a prisoner on licence without a supervision condition would be to misapply the plain meaning of para. 1(1)(a) of Schedule 1 to

the Prison Act 2011 (requiring the Parole Board to balance the risk to the public of a further offence being committed at a time when the prisoner would otherwise be in prison against the benefit, both to the public and the prisoner, of early release into the community under a degree of supervision). A supervision requirement could be imposed upon the prisoners notwithstanding that they would not be residing in the jurisdiction following their release. The fact that enforcement could prove problematic because of their intention to reside outside the jurisdiction was not a reason for not imposing it; rather it was a factor to be taken into account as part of the balancing exercise required by para. 1(1) of Schedule 1, as stated in para. 1(2)(c) of the Schedule (para. 9; para. 11).

(2) There was no authority indicating that drawing a distinction between residents and non-residents was a prohibited ground of discrimination for the purposes of s.53(6) of the Prison Act 2011 (requiring the Parole Board to consider each case on its own merits without discrimination on any grounds) or s.14 of the Constitution (prohibiting discrimination) (para. 10).

(3) Consideration of the nature and circumstances of the offence as required by para. 1(2)(a)(i) of Schedule 1 required a wider perspective than simply undertaking an assessment of the seriousness of the offence, but the assessment of seriousness was an important part of that exercise (para. 13).

(4) Both prisoners were assessed as being at medium risk of re-offending; they minimized their involvement in the importation, indicating a failure to acknowledge the seriousness of their offences; and there was a risk that a supervision requirement would be flouted due to their intention to reside outside the jurisdiction. These factors meant that the risk of their committing further offences when they would otherwise be in prison was of an unacceptable level and early release under parole licence should therefore be refused. The date for the further review of both decisions would be fixed at June 1st, 2015 (para. 22; para. 32).

Legislation construed:

Prison Act 2011, s.54: The relevant terms of this section are set out at para. 8.

Schedule 1, para. 1: The relevant terms of this paragraph are set out at para. 8.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.14:

> "(1) Subject to subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.
>
> (2) Subject to subsections (6), (7) and (8), no person shall be treated in a discriminatory manner by any person acting in the

performance of any public function conferred by any law or otherwise in the performance of the functions of any public office or any public authority.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of or social origin, political or other opinions or affiliations, colour, language, sex, creed, property, birth or other status, or such other grounds as the European Court of Human Rights may, from time to time, determine to be discriminatory, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description."

R. Fischel, Q.C. for the applicant;
The defendant did not appear and was not represented;
C. Miles for both interested parties.

1 **DUDLEY, C.J.:** These are two distinct applications by the Minister for Justice pursuant to s.54(5) of the Prison Act 2011.

Background

2 Both interested parties (jointly "the prisoners") entered guilty pleas in respect of offences committed by them on June 2nd, 2013. Juan Luis Galliano Garcia ("JLGG") was charged with five counts and Juan Diego Tabares Garcia ("JDTG") with seven counts. These included possession and importation of some 500 kg. of cannabis resin and operating a fast launch without a licence. Full credit was given for their guilty pleas and on June 21st, 2013 both were sentenced to 4 years' imprisonment. They have now served just over 18 months.

3 There is a reference in the material placed before the Parole Board which suggests that I sentenced the prisoners. I did not; in fact they were dealt with by Black, J.

4 At a meeting of the Parole Board held on October 1st, 2014, the eligibility for parole of both prisoners was considered and the Board unanimously agreed to recommend that both be granted early release under parole licence as from October 17th, 2014. The draft licence supplied by the Parole Board in respect of both imposed the following conditions:

"(a) report to the Care Agency upon release;

(b) be of good behaviour, and not behave in a way which undermines the purposes of the release on licence, which are to protect the

public, prevent re-offending and promote successful re-integration into the community; and

(c) not commit any offence."

5 By two letters, which are materially identical, dated October 17th, 2014, the Minister, in accordance with s.54(3) of the Act, asked the Parole Board to reconsider its decisions and asked it to consider whether it had given sufficient weight to the following factors:

"
- The seriousness of the crime, especially in view of the large amount of drugs involved;
- the time served;
- the level of risk;
- the fact that [JLGG and JDTG] would not be under supervision as he intends (should he be permitted) to live outside the jurisdiction."

6 At a meeting held on the October 24th, 2014, the Parole Board reconsidered its decisions and, by way of final advice, the recommendations made on the October 1st, 2014 were confirmed. The minutes of that meeting are on the following terms:

"*Inmate Juan Luis Galiano Garcia and Inmate Juan Diego Tabares Garcia*

Seriousness of the offence: under the present legislation, Schedule 1, para. 1(2)(a)(i), the Board needs to look at the nature and circumstances of the offence. This does not refer to the seriousness of the offence alone. Seriousness is a matter that is taken into account primarily by the sentencing judge. In looking at the nature and circumstances of the offence, the Board is assessing from a wider perspective the issue of safety to the public not being placed unacceptably at risk. Having taken the nature and circumstances of the offence into account the Board came to the conclusion that the risk was acceptable. The Board remains of that view.

Time served: is not something that the Board is able to consider under the current legislation. The matters that can be considered are clearly set out in Schedule 1.

Level of risk: the Board, for the reasons explained in the original decision, felt the risk was acceptable.

Not be under supervision as the inmates live outside the jurisdiction: the Board does [not] decide whether the inmates remain in Gibraltar or leave Gibraltar. The Board considers that all prisoners should remain within Gibraltar during the period of the licence to enable

appropriate supervision to take place. There are no facilities for this when an inmate does not reside in Gibraltar. The Act provides that it is the government that gives permission to allow an inmate to leave Gibraltar. When recommending release on parole the Board does not take this into account as it is not one of the factors contained in Schedule 1. This is precisely why the Board brings this issue to the attention of the Minister for him to give or not to give permission. For the Board to behave in any other manner would not only be unreasonable in the public law sense but wrong. To give this issue any relevance would be to discriminate against persons who do not have permanent residence in Gibraltar. Lack of facilities is not a matter for the Board."

The "not" in brackets is a manuscript amendment to the minutes following clarification by the Secretary to the Parole Board to the Minister's office.

7 The Parole Board has not entered an appearance, but it wrote to the Attorney General's Chambers on November 12th, 2014 and asked that that letter, which is in the following terms, be brought to the attention of the court:

"Applications for review before Supreme Court—Juan Luis Galliano Garcia and Juan Diego Tabares Garcia

The Parole Board acknowledges receipt of your letters and enclosures of November 6th, 2014 and November 10th, 2014. I have been asked to reply by the Parole Board on the terms that follow.

The Parole Board considers that its views are clearly set out in the minutes that have been put in evidence. Consequently, it does not feel that it would wish to say any more to the court than what is contained in the minutes. In any event, the Parole Board does not have a budget to engage lawyers in applications of this nature, so it does not consider that it should appear without receiving independent advice. The Parole Board would ask that you read this letter to the court and indicate that no disrespect is intended by its non-appearance.

There is one issue that we would like to be placed in evidence before the court prior to any substantive hearing as the Parole Board considers it to be relevant, especially the references to limited resources in Gibraltar. It is that, at the meeting of October 24th, 2014, the following was also included in the minutes:

'*Further consideration in light of the Minister's request for review*

The Board has in the past suggested that the parole system be amended to reflect other jurisdictions, for example, the UK

> allows parole after 50% of sentence automatically for all prisoners sentenced up to four years imprisonment. The current Act in Gibraltar reflects the parole system and the reasoning applied for applicants for parole that committed more serious offences and are serving longer sentences. Additionally, the resources available in Gibraltar to apply these criteria are limited. All this militates in favour of a review of the system or that it should be adequately resourced, inclusive of a provision of aftercare probation, hostels, supplementary benefit and health care. All this has financial implications for the government.'
>
> The Parole Board considers that this is an important factor in its decision-making process in many applications, especially those concerning persons who are not resident in Gibraltar."

The statutory provisions

8 Section 54(5)–(8) of the Prison Act provides:

> "(5) If the Parole Board's final advice is for release, the Minister may make an application to the Supreme Court within 7 days of receipt by him of the Parole Board's final advice.
>
> (6) The Parole Board and the prisoner shall both be served with the application as interested parties and shall have the right to make representations before the Court.
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> (7) On an application by the Minister under subsection (5), the Court shall—
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> (a) consider the matter on its merits;
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> (b) take into account the matters set out in Schedule 1; and
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> (c) exercise its own discretion
>
> in considering whether or not to direct the release of the prisoner.
>
> (8) If the Court directs the release of the prisoner, the Minister shall give effect to that direction."

It is evident from s.54(7) that, in determining whether or not to direct the release of a prisoner, the hearing before this court is not in the nature of a review of the decision of the Parole Board but rather is by way of re-hearing. In reaching its decision, like the Parole Board, this court must take account of the matters set out in para. 1 of Schedule 1 to the Act. Although extensive, it is useful to set out that provision in full:

"**Matters to be taken into consideration by the Parole Board.**

Prisoners serving a sentence for a determinate period.

1.(1) In deciding whether or not to advise the Minister to release a prisoner on licence, the Parole 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; 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, recognising 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

(ix) 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."

9 Paragraph 1(1) of the Schedule establishes the approach to be taken when considering release on licence. Essentially, the Parole Board (or the court following a s.54(5) referral) must undertake a risk assessment of the likelihood of a prisoner committing an offence when he would otherwise be in prison, as against the reduction in risk of re-offending by a supervised reintegration into the community. In respect of both prisoners, the Parole Board assumed that, because upon release on licence the prisoners would (subject to Government approval pursuant to s.57(2) of the Prison Act) leave the jurisdiction, they could not be made susceptible to supervision and therefore no such condition was attached to the draft licence. In my view, the release of a prisoner on licence in the absence of supervision is to misapply the plain meaning of para. 1(1)(a) of the Schedule.

10 The issue which appears to arise from the Parole Board's October 1st, 2014 minutes is whether taking account of the fact that a prisoner is not resident in Gibraltar and therefore not amenable to supervision following release on licence would amount to unlawful discrimination. Section 53(6) of the Act requires the Parole Board (and therefore, by extension, this court) to consider each case on its own merits without discrimination on any grounds. In my view, the reference to "discrimination on any grounds" must be read in a manner which is consistent with the protection from discrimination afforded by s.14 of the Constitution. I am not aware of an authority which suggests that drawing a distinction

between residents and non-residents is *ipso facto* a prohibited ground of discrimination. In any event, in respect of both these prisoners, the position is that (by virtue of being nationals of an EU country in which they are resident, certainly since December 1st, 2014) they may, pursuant to the Transfer of Sentenced Persons (European Union) Regulations 2014, request the initiation of the procedure for the recognition and enforcement of the custodial sentence by the Spanish authorities—the purpose of such transfers being to facilitate the social rehabilitation and successful reintegration of the sentenced person into society. Rehabilitation and reintegration could be jeopardized if the sentenced person were released with no supervision.

11 But even if drawing a distinction between residents and non-residents were a prohibited ground of discrimination, the issue does not arise. As I understood their submissions, Mr. Fischel, Q.C. and Mr. Miles agree that the supervision requirement may be imposed upon prisoners notwithstanding that they may not be residing in the jurisdiction following their release. I accept that proposition. Indeed, s.57(2) specifically provides for the imposition of standard conditions as the Minister, in consultation with the Parole Board, considers appropriate in such circumstances. A licensee could, of course, seek to flout a condition that he keep in touch with his supervising probation officer, but there is nothing in the statute which prevents the imposition of such a requirement. The fact that enforcement of a condition could prove problematic is not a reason for not imposing it but rather a factor that needs to be taken into account in undertaking the risk assessment under para. 1 of the Schedule. Indeed, the likelihood of compliance with the conditions and the requirements of supervision is to be found at para. 1(2)(c) as one of the factors to be taken account of when considering the release of a prisoner on licence.

12 I therefore turn to deal with each prisoner.

JLGG

13 *The nature and circumstances of the offence including its impact on the victim:* in part, I agree with the approach of the Parole Board that consideration of this factor requires a wider perspective than simply undertaking an assessment of the seriousness of the offence. However, the assessment of seriousness is an important part of that exercise. For example, whilst importation of 10g. of cannabis resin for personal use would not disclose a wider risk to the community, importation of a huge quantity such as 500 kg., being importation on a significant commercial scale no doubt with the expectation of substantial financial gain, is indicative of the possibility of a further serious offence being committed if the prisoner were to be released on licence. Also, not ignoring that although in this case there is no identifiable victim, had the criminal

enterprise succeeded, the harm to the community would have been very significant.

14 The explanation given by JLGG to the probation officer and before me was that a friend offered him the opportunity to be involved in the drug trafficking operation; that at first he refused but two months later he acquiesced because he was in a dire financial position; and also that having the vessel registered in his name was a condition of his being allowed to participate in the venture. In my view, he has sought to minimize his involvement. The registration in his name of a vessel said to be worth some £40,000 strongly suggests that he played a more significant role in the commission of the offence and had closer ties with those organizing the importation than he may be admitting to. From a risk assessment perspective, as the probation officer puts it in her report, "it is evident that he associates with friends who are involved in drug trafficking and this raises some concerns." In my view, registration of such a valuable asset is evidence of close association.

15 *The prisoner's background:* it appears that he has a supportive wife and family. He asserts that he has no previous convictions; this has not been independently verified but I proceed on the basis that it is an accurate statement.

16 *Efforts to address attitudes and behavioural problems which led to the commission of the offence:* the prisoner has entered compact status, his voluntary drug tests are negative and it is clear from the reports by prison officers that his industry in prison is considered to be excellent and he not only carries out his normal prison chores but also involves himself with additional tasks. The following comment by a principal officer is particularly instructive: "I am certain his positive and forward thinking attitude will serve him well in his attempt to pick up where he left off and pursue a constructive lifestyle on his release."

17 *Attitude and behaviour to other prisoners and staff:* there have been no breaches of prison discipline and he is clearly an inmate who is polite towards officers and fellow inmates, with prison officers describing his behaviour as excellent.

18 *Awareness of the impact of the offence and demonstrable insight into his attitude:* according to the probation officer's report, JLGG now realizes the impact of these offences in the community. Evidently, it is difficult to ascertain whether it is a genuine realization or a self-serving statement for the purposes of enhancing the chances of release on licence.

19 *Medical considerations relevant to risk:* JLGG has received psychological support to cope with life in prison and suffers from type 1 diabetes. Neither of these are material to the risk of a further offence being committed at a time when he would otherwise be in prison.

20 *Suitability of home circumstances:* JLGG told the probation officer and confirmed before me that upon release he would live with his partner and child in a property owned by his parents-in-law. He informed the probation officer that he wished to move away from his old neighbourhood and start afresh in an area that is more family orientated and away from drugs. According to him, his father-in-law has procured him a job, but if that were not to come about he would work the land in a plot owned by his father-in-law. It is fair to say that he impressed me as someone who was genuinely missing his partner and daughter.

21 The probation officer wrongly assumed that, because JLGG would be living in Spain, supervision would not be available. For the reasons I have given, there is nothing preventing supervision being imposed. However, it is evident that such a condition could be flouted with relative ease and, at a practical level, a recall to prison could prove problematic. Before me, the prisoner indicated his willingness to reside in Gibraltar if that would allow for his release on licence. The difficulty with that proposal is that there are no details before me of where or with whom he would live.

22 I am of the view that this is a borderline case, not least because JLGG is a prisoner whose conduct during his time in custody has been irreproachable. Although the probation officer's recommendation is that he is suitable for release on licence, she assesses him as being at medium risk of re-offending. However, I remind myself that para. 1(1)(b) of the Schedule enjoins me to "take into account that safeguarding the public may often outweigh the benefits to the prisoner of early release." In minimizing his involvement, there is an implicit failure to acknowledge the seriousness of the offence. This, in combination with the risk that supervision could be flouted, leads me to conclude that there is a risk of JLGG committing a further offence when he would otherwise be in prison and the level of risk is not acceptable.

23 Section 60 of the Prison Act requires that the earliest date for review of this decision be fixed and that it be no later than a year from this decision. I fix that review date at June 1st, 2015.

JDTG

24 *The nature and circumstances of the offence including its impact on the victim:* it is unnecessary for me to repeat the extent to which the seriousness of the offence is relevant. The explanation provided by JDTG to the probation officer and before me was that he was in financial difficulties because he was unemployed, in receipt of only €400 by way of state support and therefore struggling to pay off debts and care for his wife and daughter, finding himself having to resort to food banks; that he frequently went fishing with a friend who suggested that he transport the drugs; and that, although his friend did not insist, he asked him a few

times and because of his financial difficulties he decided to do it. According to JDTG, his involvement was limited to navigating the vessel back from the Straits to Gibraltar Bay; he did not navigate the vessel to the collection point as it was someone else on the vessel who knew where to go. Also, his case was that no particular skill was required to navigate the vessel and that this could be done by anyone capable of driving a car. I am of the view that JDTG minimizes his involvement in the offence and I share the probation officer's opinion that it is unlikely that someone would have entrusted him with the amount of drugs involved unless he had some association with those involved in drug trafficking. Indeed, I would go further and suggest a reasonably significant level of association.

25 *The prisoner's background:* it appears that he has a stable supportive relationship with his common-law wife who visits him weekly and with whom he has a 6-year-old daughter. He has a previous conviction in Spain for drink driving and subsequently received an 8-month custodial sentence for driving whilst disqualified. He reports no further previous convictions; this has not been independently verified but I proceed on the basis that his report is accurate.

26 *Efforts to address attitudes and behavioural problems which led to the commission of the offence:* the prisoner entered compact status on October 3rd, 2013; his voluntary drug tests have proved negative. He helps with the laundry, attends school and is learning English. His tutor describes him as showing "considerable interest, enthusiasm and commitment to his learning" and as a very polite and conscientious individual who has always had an excellent rapport with his classmates and has shown great respect towards him.

27 *Attitude and behaviour to other prisoners and staff:* there have been no adjudications against him and he has exhibited excellent behaviour towards prison staff and his fellow inmates.

28 *Awareness of the impact of the offence and demonstrable insight into his attitude:* according to the probation officer, JDTG accepts that he ignored any risks to potential victims and, in particular, has acknowledged the impact which the commission of the offences has had on his family.

29 *Medical considerations relevant to risk:* none.

30 *Suitability of home circumstances:* JDTG has a supportive partner and says that on release would live with her and their daughter in a flat provided by his local council at a rent of €220 per month. According to him, his parents are also supportive. On release, either at this stage or later, he will have employment. It appears that his father's employer operates a recruitment process whereby in certain circumstances a son can take over his father's job when the latter retires.

31 In respect of this prisoner, the probation officer also wrongly assumed that, because he would be living in Spain, supervision would not be available. In this regard, the views I expressed in respect of JLGG are of equal application to JDTG.

32 This is also a borderline case. JDTG has also behaved impeccably during his time in prison. Although the probation officer's recommendation is that he is suitable for release on licence, she assesses him as being at medium risk of re-offending. However, I again remind myself that para. 1(1)(b) of the Schedule enjoins me to "take into account that safeguarding the public may often outweigh the benefits to the prisoner of early release." In minimizing his involvement, JDTG in some measure fails to acknowledge the seriousness of the offence. This, in combination with the risk that supervision could be flouted, leads me to conclude that there is a risk of his committing a further offence when he would otherwise be in prison and the level of risk is not acceptable.

33 Section 60 of the Prison Act requires that the earliest date for review of this decision be fixed and that it be no later than a year from this decision. I fix that review date at June 1st, 2015.

Orders accordingly.