[2017 Gib LR 88]

MINISTER FOR JUSTICE v. I. MARRACHE and PAROLE BOARD

COURT OF APPEAL (Kay, P., Goldring and Moore-Bick, JJ.A.): May 5th, 2017

Prisons—parole—application for consideration by court—if Parole Board recommends early release and Minister for Justice applies to court under Prison Act 2011, s.54(5) for court's consideration, Minister may subsequently withdraw s.54(5) application prior to its determination by court

The first defendant was recommended for early release on licence.

In 2014, the first defendant had been sentenced to seven years' imprisonment for conspiracy to defraud. After he had served one-third of his sentence, the Parole Board recommended that he be released on licence. The Minister for Justice asked the Parole Board to reconsider its decision (pursuant to s.54(3) of the Prison Act 2011), which it did, confirming its advice. The Minister then made an application to the court under s.54(5) of the Act. Under s.54(7), the court was thereafter required to—

"(a) consider the matter on its merits;
(b) take into account the matters set out in Schedule 1; and
(c) exercise its own discretion

in considering whether or not to direct the release of the prisoner."

The Minister was subsequently supplied with the underlying material upon which the Parole Board had made its decision. As a result of this, he chose to accept the Board's advice on the matter and directed that the first defendant be released on licence. The Minister agreed a consent order with the first defendant's counsel, by which the s.54(5) application would be permanently stayed.

The matter came before the Supreme Court, where the judge (Jack, J.) considered that the Minister arguably could not discontinue the s.54(5) proceedings and that, once an application had been made, it was for the court alone to decide the issue of early release on the merits.

Although the first defendant had been released on licence, the Minister was granted leave to appeal against the Supreme Court's decision, as the issue of whether the Minister could withdraw or discontinue an application under s.54(5) before it had been determined on the merits by the court was of wider importance.

Held, ruling as follows:

The Minister for Justice had the power to withdraw a s.54(5) application prior to its determination by the court. This was consistent with general principles of administrative law. In the present case, the Minister's initial application had been made without knowledge of the compelling material that had informed the recommendation of the Parole Board for early release. It would be counterintuitive if the Minister were unable to reconsider his decision to apply to the court once aware of that material. In the unlikely event of the Minister making a tainted decision to withdraw, a person with sufficient interest in the decision could apply for judicial review. The court did not consider that the points which had influenced the judge below compelled the conclusion he had reached: (i) The Minister was under no obligation to make an application; he had a discretion which fell to be considered in the context of broad public interest considerations. He could accept and implement the Parole Board's final advice or make an application to the court. (ii) The Minister had not been contending for an independent power to release prisoners. On the contrary, he was recognizing that only the Parole Board and, where an application under s.54(5) was made, the court had any decisive power. (iii) The perceived risk that if the Minister could withdraw an application prior to judicial determination he would be exposed to political pressure or lobbying had been exaggerated. (iv) The court's obligation under s.54(7) to consider the question of early release on its merits would only subsist when an application was extant and did not assist in considering whether an application under s.54(5) could be withdrawn. Finally, as the making of an application under s.54(5) and its subsequent withdrawal were matters of public interest, it would be incumbent upon the Minister, on notice to the interested parties, to announce the withdrawal of his application in open court, giving brief reasons (paras. 10–17).

Cases cited:

(1) *R.* v. *Home Secy., ex p. Salem*, [1999] 1 A.C. 450; [1999] 2 W.L.R. 483; [1999] 2 All E.R. 42; (1999), 11 Admin. L.R. 194, referred to.

(2) *R. (Chaudhuri)* v. *General Medical Council*, [2015] EWHC 6621 (Admin); [2015] Med. L.R. 440; (2016), 147 BMLR 200, followed.

Legislation construed:

Interpretation and General Clauses Act 1962, s.47(1): The relevant terms of this sub-section are set out at para. 12.

Prison Act 2011, s.54: The relevant terms of this section are set out at para. 1.

Lord Pannick, Q.C. and *E. Labrador* for the appellant.

1 **KAY, P.:** This appeal raises a short but important point on the relationship between the Parole Board, the Minister for Justice ("the Minister") and the Supreme Court ("the court") in connection with the early release of prisoners. The statutory scheme is set out in the Prison Act

2011. One of its purposes was to depoliticize the decision whether or not to permit early release. By s.53, it is for the Parole Board to advise the Minister about the early release of a prisoner by reference to criteria prescribed in Schedule 1. Where the Parole Board advises that a prisoner should be released, the Minister cannot reject that advice. Initially, he has to choose between accepting it and asking the Parole Board to reconsider it: s.54(1) and (3). If the Parole Board's "final advice" following reconsideration remains for release, again the Minister has two options. Either he accepts and acts upon it by releasing the prisoner or he makes an application to the court. Section 54(5)–(8) 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.
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> (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
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> in considering whether or not to direct the release of the prisoner.
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> (8) If the Court directs the release of the prisoner, the Minister shall give effect to that direction."

For the sake of completeness, I should add that, outside this procedure, the Minister has a free-standing power to order release at any time on compassionate grounds: s.54(2).

The facts

2 In the present case, Mr. Marrache was sentenced to seven years' imprisonment for conspiracy to defraud on July 4th, 2014. After he had served one-third of that sentence, his early release was considered by the Parole Board on October 28th, 2016. It recommended that he be released on licence on November 11th. The Minister immediately asked the Parole Board to reconsider its decision pursuant to s.54(3), but on November 18th the Parole Board confirmed its advice. We do not know precisely when the Minister received notice of that final advice. However, on November 29th he filed an application to the court under s.54(5). No one has suggested that the application was out of time.

3 On November 29th, the Minister had not seen the underlying material upon which the Parole Board had reached its decision. That only came into his possession when it, together with a skeleton argument, was supplied by Mr. Marrache's lawyers on January 10th, 2017. In his witness statement, Mr. Robert Fischel, Q.C., Crown Counsel, stated:

> "[At a meeting on January 11th] I advised the Minister, who read each of the additional documents during our meeting, and which we then discussed, that upon the documentation now before him the test for acceptance of the advice from the Parole Board regarding the release of Mr Marrache would appear to be satisfied and therefore that it would be wrong not to give immediate effect to the recommendation of the Parole Board to release Mr Marrache and not to keep him in prison any longer."

4 On January 12th, the Minister directed the Prison Superintendent to release Mr. Marrache on licence, subject to the same conditions which had been recommended by the Parole Board. He also agreed a consent order with Mr. Marrache's lawyers by which the s.54(5) application would be permanently stayed.

The hearings in the Supreme Court

5 On January 23rd, the matter came before Jack, J. and he gave the first of several judgments dealing with it. He expressed doubt whether the parties could terminate the s.54(5) application by agreement and without the approval of the court. He said (2017 Gib LR 1, at para. 50):

> "Section 54(7) . . . provides that on a s.54(5) application 'the Court *shall* . . . consider the matter on its merits.' Approving a consent order without examining the basis on which the order is sought would not involve a consideration of the matter on its merits."

6 He further considered (at para. 53) that, once the Minister has filed his s.54(5) application, he is "arguably *functus officio*, in other words he cannot change his mind and decide that the Parole Board was right after all. The matter is simply out of his hands at that stage." He was essentially expressing provisional views in this judgment.

7 Jack, J. held a further hearing on February 2nd, when he held that the Minister had no power to discontinue s.54(5) proceedings and that, once the application was made, it was for the court and the court alone to decide the issue of early release on the merits. It is this conclusion that is under challenge in the present appeal.

8 In a third judgment on February 3rd, Jack, J. considered the merits and concluded that Mr. Marrache should be released on licence subject to conditions identical to the ones which the Minister had sought to impose on January 12th. In a further judgment on February 14th, Jack, J. granted

the Minister leave to appeal (if required). The target of the appeal is the judgment and order of February 2nd.

9 In the event, Mr. Marrache has been released and this appeal is of no continuing interest to him. However, the issue it raises, namely whether the Minister can withdraw or discontinue a s.54(5) application before it has been determined on the merits by the court, is of wider importance. It may arise in other cases. It potentially affects the liberty of individuals, particularly between the date when the Minister wishes to withdraw or discontinue the application and the date on which it would otherwise be determined by the court. Accordingly, we thought it right to hear the appeal, even though the number of s.54(5) applications is small—three in six years. Our decision will clarify the position. We took the view that we should hear the appeal in accordance with the approach expounded in *R.* v. *Home Secy., ex p. Salem* (1). Although we have not had the benefit of adversarial argument, Lord Pannick, Q.C. has dutifully drawn to our attention all opposing arguments which his legal ingenuity has been able to contemplate, including the matters which troubled Jack, J. as manifested in his several judgments.

Discussion

10 There are a number of points which influenced Jack, J. but which, with the advantage of further submissions, I consider do not compel the conclusion he reached.

(i) He was of the view that the Minister does not have a "broad discretion" when considering whether to make an application to the court under s.54(5). I respectfully disagree. The Minister is under no obligation to make an application. He has a discretion which is not restricted by prescribed criteria. It is a discretion which falls to be considered in the context of broad public interest considerations. He may either accept and implement the Parole Board's final advice or make an application to the court. The discretion is broad even though it can only be exercised in two ways.

(ii) Jack, J. considered that the Minister was contending for an "independent power to release prisoners." On the contrary, in my view he is recognizing that only the Parole Board and, where an application under s.54(5) is made, the court can be said to have any decisive power. They alone have the statutory authority to apply the Schedule 1 criteria. Indeed, without a recommendation by the Parole Board for release, there can be no early release (save in s.54(2) "compassionate grounds" cases).

(iii) Jack, J. thought that if the Minister were to have the power to withdraw a s.54(5) application prior to judicial determination, he would be exposed to the risk of political pressure or lobbying. It seems to me that

this perceived risk has been exaggerated. The mere fact that representations can be made to the Minister, one way or the other, should not be equiparated with improper influence. As this case illustrates, it can be helpful for the Minister to receive material of which he was unaware during the short seven-day period within which any application to the court has to be made. If, in a different case, there were to be evidence of the Minister having been influenced by inappropriate pressure or ulterior considerations, his decision to withdraw would be amenable to judicial review.

(iv) Jack, J. emphasized that, under s.54(7), the court has a mandatory obligation to consider the question of early release on the merits—the word is "shall." In my judgment, however, this obligation only subsists when an application is extant. The language of s.54(7) does not assist in considering whether an application under s.54(5) can be withdrawn.

11 The most important language in relation to the construction of s.54 is the language through which the discretion invested in the Minister by sub-s. (7) is conferred. It is not expressed as a power to refer the issue to the court. It is a power to apply to the court. Whilst it may be arguable that a power to refer, once exercised, would not be amenable to withdrawal, at least without the leave of the court, it seems to me that the language of application is not so restrictive. An undetermined application can be seen more as still being the creature of the applicant, rather than of the court. Moreover, I do not find it helpful to shoehorn the question of withdrawal under s.54(5) into the jurisprudence on discontinuance under the Civil Procedure Rules. This is not everyday civil litigation. There is no defendant or respondent. The Parole Board and the prisoner are "interested parties": s.54(6). There is no burden of proof. The court is required to make its own decision if required to do so by the one person who has the power to seek such a determination.

12 In my judgment, all this points towards the Minister having the power to withdraw his application prior to its determination by the court. This is also consistent with general principles of administrative law. Lord Pannick refers to s.47(1) of the Interpretation and General Clauses Act 1962 (which resembles s.12 of the Interpretation Act 1978 in the United Kingdom): "Where any Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may [be] exercised and the duty shall be performed from time to time as occasion requires."

13 In this context, it is significant that the exercise of the power by the Minister under s.54(5) does not by itself affect individual legal rights. If it did, different considerations would arise. It simply initiates a legal process: see Wade & Forsyth, *Administrative Law*, 11th ed., at 191 (2014).

14 This analysis is illustrated by *R. (Chaudhuri)* v. *General Medical Council* (2), where Haddon-Cave, J. said ([2015] EWHC 6621 (Admin), at paras. 47–49):

> "Public bodies must have the power themselves to correct their own decisions based on a fundamental mistake of fact. To suggest otherwise would be to allow process to triumph over common sense. There is no sense in requiring wasteful resort to the courts to correct such obvious mistakes. Administrative law should be based on common sense.
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> . . .
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> 49 A broad corrective principle of the nature described above is consonant with the principles of proportionality and utility. It is also consonant with the emerging principle of 'good administration' in administrative law . . ."

Haddon-Cave, J. was careful to observe that this approach remains subject to considerations such as fairness and legitimate expectation, not least in relation to the protection of existing legal rights.

15 In the present case, the initial application under s.54(5) was made in ignorance of the compelling material which had informed the recommendation by the Parole Board for early release. It would be counterintuitive if the Minister was unable to reconsider his decision to apply to the court once he had seen and been advised on that material.

Conclusion

16 For all these reasons, I am satisfied that the Minister does indeed have the power to withdraw a s.54(5) application prior to its determination by the court. Such a construction seems to me to accord with principle, as I have sought to explain. It also has practical benefits. These include the opportunity for the Minister to review a decision which has to be made under the pressure of the seven-day time limit and the avoidance of consumption of scarce judicial resources in circumstances where the primary decision-maker (the Parole Board) and the one person with the statutory power to challenge that decision (the Minister) come to agree on the appropriate outcome. To the extent that the Minister may make a tainted decision to withdraw—and I consider the possibility of that to be slight—there remains the possibility of an application by a person with sufficient interest for judicial review of that decision, difficult though such an application might be.

17 Finally, I appreciate that the making of an application under s.54(5) and its subsequent withdrawal are themselves matters of public interest, especially in a high profile case such as the present one. Accordingly, it seems to me that it is incumbent upon the Minister, on notice to the

interested parties, to announce the withdrawal of his application in open court, giving brief reasons. Beyond that, I do not consider that there is a need for more formality.

18 **GOLDRING, J.A.:** I agree.

19 **MOORE-BICK, J.A.:** I also agree.

Ruling accordingly.