**[2019 Gib LR 219]**

## SIMMONS v. PAROLE BOARD

SUPREME COURT (Ramagge Prescott, J.): December 3rd, 2019

*Prisons—parole—sexual offences prevention order—order is important factor to be considered in assessment of risk of reoffending*

The claimant challenged the Parole Board's decision and advice to the Minister for Justice not to release the claimant on licence.

The claimant had been convicted of three counts of possession of indecent images of children and sentenced to 30 months' imprisonment. He had a parole hearing before the Board in March 2019, following which the Board recommended to the Minister for Justice that the claimant be refused parole. The Minister refused parole and directed that the earliest date for a review of the claimant's case would be February 2020.

At the parole hearing, the Board had before it the parole report which addressed the claimant's progress and behaviour in prison; a parole assessment report which addressed the factors listed in para. 1(2) of Schedule 1 to the Prison Act; a drug testing report; the sexual offences prevention order; and the trial judge's sentencing notes. The claimant and his counsel addressed the Board.

The sexual offences prevention order provided:

"IT IS HEREBY ORDERED THAT the Defendant is prohibited from:—

1. a. Using any device capable of accessing the internet unless:
   i. it has the capacity to retain and display the history of internet use, and
   ii. he makes the device available on request for inspection by a police officer.
   b. Deleting the history of his internet use.
   c. Possessing or using any device capable of storing digital images unless he makes it available for inspection by a police officer if such a request can be [made] pursuant to law.
2. This order is granted for a period of 5 years commencing on 2 October 2018."

The claimant had been granted permission to challenge the Board's decision on two grounds: (a) whether the Board properly assessed the risk to the public of the claimant reoffending if released early on licence in view of the fact that he was subject to a sexual offences prevention order; and (b) whether the Board had placed undue reliance on the claimant's denial of guilt when considering the risk to the public of the claimant reoffending.

The Board submitted that a sexual offences prevention order would only affect the balancing exercise that it had to carry out if the effect of the order was to lessen the risk of reoffending by altering a prisoner's circumstances from those at the time of commission of the offence, which the order in the present case did not do. The sexual offences prevention order was ineffective and had no material impact on the risk of future offending.

The claimant submitted *inter alia* that the sexual offences prevention order by its very nature sought to reduce the risk of reoffending.

**Held,** quashing the Board's decision and remitting the matter for reconsideration:

(1) The sexual offences prevention order was an important factor to be considered in the overall assessment of risk. It was evident from the minutes of the Parole Board meeting that the claimant's counsel drew the Board's attention to the order, its terms and the consequences of its breach but there was no evidence before the court that the Board had included a discussion or consideration of the order in its evaluation of the risk posed by the claimant's early release. The court disagreed with the Board that the order was ineffective and had no material impact on the risk of reoffending. The starting point must be that a sexual offences prevention order was directly relevant to the issue of risk of reoffending. The aim of such an order was to reduce the risk of reoffending. It could not be said that the existence of a sexual offences prevention order in itself in any given case would automatically reduce the risk of reoffending to an acceptable level in the consideration by the Board of a prisoner's release, but it was a consideration which the Board ought to take into account as one of the factors in the balancing exercise. The Board's decision would therefore be quashed and the matter remitted to the Board for reconsideration (paras. 11–15).

(2) Although it was not necessary to do so, the court considered whether the Board had given undue weight to the claimant's denial of guilt. The law in relation to the weight to be attached to a claimant's denial of guilt was not in dispute: (i) The Board must assume a prisoner's guilt even in the face of the prisoner's denial. (ii) A prisoner should not be denied parole except in very meticulous circumstances solely on the basis that he had denied guilt. (iii) Denial of guilt was merely one of the factors to be taken into consideration by the Board and each case must be decided on its own facts. It was clear in the present case that the Board considered various matters in addition to the denial of guilt, such as the seriousness of the offence and the claimant's home environment. When considering the issue of denial, a prisoner was subject to a sliding scale from the persistent offender who refused to accept his guilt to the first offender where the motivation for the offence was clear and did not indicate a likelihood of reoffending. The claimant was not a persistent offender in the sense that he did not have previous convictions of a similar nature, but nor was his offending a one-off act. It comprised a course of conduct. The Parole

Board considered this, as it was entitled to do. In addition, the claimant's offending was not an offence where the motivation was clear and which did not point to a likelihood of reoffending: quite the opposite. Given the claimant's denials, the motivation for the offending was unclear. The parole assessment report concluded that the evidence reflected a deviant sexual interest in pre-pubescent and pubescent children and that deviant sexual interest was one of the most well established predicators of sexual recidivism. The Board also took into account that the claimant had indicated no intention to change his activities and lifestyle, indeed on release he intended to set up an internet company. Denial of guilt was not in itself an indicator of increased risk, but if denial led to a refusal to address or modify the behaviour then it became an important consideration in the overall assessment of risk. It was possible for an offender to deny guilt but nevertheless be willing to address aspects of his behaviour. The claimant appeared not to recognize the seriousness of the offence. In the circumstances, the Board did not give undue weight to the issue of the claimant's denial of guilt (paras. 17–29).

**Cases cited:**

(1) *R. (Austin)* v. *Parole Bd.*, [2011] EWHC 2384 (Admin), considered.
(2) *R. (Hepworth)* v. *Home Secy.*, March 26th, 1995, unreported, referred to.
(3) *R. (Oyston)* v. *Parole Bd. for England & Wales*, [2000] EWCA Crim 3552; [2000] Prison L.R. 45, distinguished.
(4) *R. (Zulfikar)* v. *Home Secy*., *The Times*, May 2nd, 1995, considered.

**Legislation construed:**

Criminal Procedure and Evidence Act 2011, s.12:

"(1) If, on application made by a police officer, a magistrate is satisfied that there are reasonable grounds for believing that—

(a) an indictable offence or a Schedule 14 offence has been committed;

(b) there is material on premises specified in the application which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence;

(c) the material is likely to be relevant evidence;

(d) it does not consist of or include items subject to legal privilege, excluded material or special procedure material; and

(e) any of the conditions specified in subsection (3) applies,

the magistrate may issue a warrant authorising a police officer to enter and search the premises."

s.26: "(1) Every power of seizure conferred by an enactment to which this section applies on a police officer who has entered premises in the exercise of a power conferred by an enactment includes a power

to require any information stored in any electronic form and accessible from the premises to be produced in a form—

(a) in which it can be taken away and in which it is visible and legible; or

(b) from which it can readily be produced in a visible and legible form."

Prison Act 2011, s.53: The relevant terms of this section are set out at para. 6.

Schedule 1, para. 1: The relevant terms of this paragraph are set out at para. 6.

*C. Bonfante* for the claimant;
*S. Catania* for the defendant.

1 **RAMAGGE PRESCOTT, J.:** This is an application which seeks to challenge the defendant's decision and consequent advice to the Minister for Justice not to release the claimant on licence.

2 At the permission hearing the claimant was granted permission to proceed with the claim on the following grounds only:

(a) whether the defendant properly assessed the risk to the public of the claimant reoffending if released early on licence in view of the fact that the claimant was subject to a sexual offences prevention order; and

(b) whether the defendant had placed undue reliance on the claimant's denial of guilt when considering the risk to the public of the claimant reoffending.

**Background**

3 The claimant was found guilty on June 13th, 2018 of three counts of possession of indecent images of children in total amounting to 7,424 images of which 901 involved images of children being penetrated including videos of such activity with pre-pubescent children. On October 10th, 2018 the claimant was sentenced to a total of 30 months' imprisonment.

4 The claimant's parole eligibility date was April 9th, 2019. The parole hearing took place on March 2nd, 2019. The Parole Board recommended to the Minister for Justice that the claimant be refused parole and the Minister acting upon the advice of the Board refused the claimant parole and explained that the Board had directed that the earliest date for the review of the claimant's case would be February 2020 and the latest date of release would be December 2020.

5 At the parole hearing, the Parole Board had before it the parole report which addressed the claimant's progress and behaviour in prison, a parole

assessment report which sought to address the factors listed at para. 1(2) of Schedule 1 of the Prison Act, a drug testing report, the sexual offences prevention order ("SOPO") and the trial judge's sentencing notes. The claimant was legally represented at the hearing by Mr. Bonfante and both he and his counsel separately addressed the Parole Board after which the Board withdrew to deliberate. I have before me the minutes of that meeting, as well as various witness statements, which set out the deliberations of the Parole Board and its conclusions.

**The law**

6 The law is not in dispute. Useful to set out s.53 of the Prison Act and para. 1 of Schedule 1:

> "53.(1) It shall be the duty of the Parole Board to advise the Minister with respect to—
>
> (a) the release on licence under section 54 . . .
>
> (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—
>
> (a) paragraph 1 of Schedule 1, if the person is serving a sentence for a determinate period . . ."

Schedule 1:

> "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
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> (b) take into account that safeguarding this 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 the circumstances—
>
> (a) whether the safety of the public would be placed unacceptably at risk and in assessing such risk the Board shall 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 and 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 release 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) representation on behalf of the victim in respect of licence conditions."

7 Not in dispute that the primary consideration of the Parole Board is consideration of the risk to the public of a further offence being committed but that is to be considered as part of a balancing exercise where the risk is analysed against the benefit to the public and the prisoner of early release back into the community.

8 Also useful to bear in mind s.1(1)(a) of Schedule 1 to the Prison Act which highlights the benefit of early release back into the community which in turn might help rehabilitation and so lessen the risk of reoffending. Apparent therefore that risk of reoffending, safeguarding of the public and rehabilitation are all important factors.

**SOPO**

9 As against this legal background I consider in the first instance whether the defendant properly assessed the risk to the public of reoffending in view of the existence of the SOPO.

10 The terms of the SOPO are not lengthy and it is helpful to set them out.

"IT IS HEREBY ORDERED THAT the Defendant is prohibited from:—

1. a. Using any device capable of accessing the internet unless:

i. it has the capacity to retain and display the history of internet use, and

ii. he makes the device available on request for inspection by a police officer.

b. Deleting the history of his internet use.

c. Possessing or using any device capable of storing digital images unless he makes it available for inspection by a police officer if such a request can be [made] pursuant to law.

2. This order is granted for a period of 5 years commencing on 2 October 2018."

11 By way of summary submitted for the Parole Board that the SOPO would only affect the balancing exercise that the Board must carry out if the effect of the SOPO were to lessen the risks of reoffending by altering the circumstances of the prisoner from those existing when he was convicted of the index offence, and in the Parole Board's submission that is not the case because the terms of the SOPO leave the claimant's circumstances unaltered for three reasons:

(i) The SOPO prohibits the claimant from using a device to access the internet that does not retain and display the history of use. Submitted for

the Board that this alters nothing because the device the claimant used did in fact retain browsing history.

That may be so but the nature of such a device might well have been a reflection of the majority of modern devices on the market used for legitimate purposes, *i.e*. ones that as a matter of course retain browsing history. The important change brought about by the SOPO is that going forward it will be unlawful for the claimant to use a device which would not retain browsing history. Having already been convicted of an internet offence, were the claimant in the future to try to download indecent pictures and cover his tracks by using a more sophisticated device which could hide browsing history, the SOPO would make such behaviour unlawful.

(ii) Secondly there is a provision under the SOPO prohibiting the claimant from using any device unless he makes it available on request for inspection by a police officer and, ancillary to this, also a provision prohibiting the claimant from possessing any device capable of storing any digital images *etc*.

Submitted for the Board that these provisions pose no deterrence for the claimant, given the existence of police powers of search and seizure in general law. I must disagree. Police powers of search and seizure (s.12 and s.26 CPEA) are only exercisable where the police can convince a court that they have reasonable grounds to suspect that an offence has been committed. In relation to the index offences that suspicion arose from a referral from the UK National Crime Agency. The SOPO puts added checks and safeguards in place by obviating the need for the police to have any suspicion that an offence has been committed before they can act. The police are in effect given the power to carry out unannounced and sporadic spot checks upon the claimant's use of any given device, and in my view, it is the unpredictability of these spot checks which may act as a deterrent for the commission of future offences.

As an aside, Mr. Catania refers to the confusing wording of para. 1(c) of the SOPO "pursuant to law." I do not think there is necessarily any resultant confusion, but if there is it is open to the prosecution to apply to vary the order. In any event any possible confusion does not detract from the essential provisions and from the checks and balances which the order seeks to impose.

(iii) Thirdly, para. 1(b) prevents the claimant from deleting search history and although the defendant submits that that adds nothing given that the claimant did not in fact delete the history when he committed the offences. The SOPO seeks to address behaviour post commission of the offence. Prior to the commission of the index offences, the claimant may not have thought to delete images because he may not have thought there was a likelihood he would be found out. Were he to be inclined to resume

the unlawful behaviour in respect of which he is convicted he may think it a good idea going forward to delete unlawful browsing history. The SOPO will make that action unlawful and therefore by necessary implication add a degree of protection against the future commission of like offences.

12 The upshot of what the Parole Board is saying is that the SOPO is an ineffective order which has no material impact upon the risk of future reoffending. I disagree. In my view the starting point must be that a SOPO is directly relevant to the issue of risk of reoffending and indeed before it is granted the court is required to conduct a detailed assessment of *inter alia* such a risk, and it will only be imposed if the court considers that there is a necessity to protect the public against the risk of future offending. I agree with Mr. Bonfante that the SOPO has as its aim the reduction of the risk of future reoffending, not least by criminalizing the behaviour which could lead to the commission of an offence, by its very nature therefore the SOPO seeks to manage the risk.

13 I do not say that the existence of a SOPO in itself in any given case will automatically reduce the risk of reoffending to an acceptable level in the consideration by the Parole Board of a prisoner's release, but it is a consideration which the Parole Board ought to take into account as one of the factors in the balancing exercise.

14 It is evident from the minutes of the Parole Board meeting that Mr. Bonfante drew the Board's attention to the SOPO, its terms and the consequences of its breach. And it is evident from those same minutes that after the claimant and Mr. Bonfante left the room the Parole Board turned its collective mind to the balancing exercise as required by statute. However, absent from the minutes and the witness statement of the chairman of the Parole Board any reference to a discussion or consideration of the SOPO in the context of the assessment of risk. Submitted for the Parole Board that the SOPO was not mentioned in the discussions because in the circumstances it was not a relevant consideration because it did not make it any less likely that the claimant would reoffend. That might well have been a legitimate conclusion for the Parole Board to have reached but one that could only be reached after consideration of the SOPO and its effect.

15 There is no evidence before me that the Parole Board included a discussion of or consideration of the SOPO in its evaluation of the risk posed by the claimant's early release. There is no reference to a discussion of the SOPO in the minutes of the meeting nor in the witness statement of the Board's chairman. In my view the SOPO was an important factor to be considered in the overall assessment of risk and I am of the view, upon the evidence before me, that the Board failed to consider the SOPO. For this reason I quash the decision of the Parole Board and order that the matter be remitted to them for consideration.

**Denial of guilt**

16 Given my findings it is not necessary for me to rule whether the Parole Board gave undue weight to the claimant's denial of guilt. That said it is an issue which has been raised and argued before me as a ground for challenging the decision of the Board and will no doubt feature in any future parole hearing. I will therefore decline it.

17 Essentially the law in relation to the weight that is to be attached to a claimant's denial of guilt is not I think in dispute and can be summarized in light of *R. (Zulfikar)* v. *Home Secy.* (4), *R. (Hepworth)* v. *Home Secy.* (2), and *R. (Oyston)* v. *Parole Bd. for England & Wales* (3).

(i) The Parole Board must assume the prisoner's guilt even in the face of the prisoner's denial.

(ii) A prisoner should not be denied parole except in very meticulous circumstances solely on the basis that he has denied guilt.

(iii) Denial of guilt is merely one of the factors to be taken into consideration by the Parole Board and each case must be decided upon its own facts.

Evident that the Parole Board considered various matters in addition to the denial of guilt, such as seriousness of the offence and the claimant's home environment to name but two. And indeed denial of guilt falls to be considered in the context of all the various factors relevant to the case.

18 Useful to set out the reasoning of Stuart Smith, L.J. in *Zulfikar* (*The Times*, May 2nd, 1995):

> "At one end of the scale is the persistent offender, in particular the persistent sex offender, who refuses to accept his guilt in the face of clear evidence and is unable to accept that he has a propensity to such conduct which needs to be tackled if he is not to offend again.
>
> In such a case it may well be a determinative consideration. At the other end of the scale is the first offender, where the motivation for the offence is clear and does not point to a likelihood of re-offending. In the majority of cases it is unlikely to be more than one of many factors to which undue weight should not be given."

19 Not in dispute that when considering the issue of denial the prisoner is subject to a sliding scale which moves from the persistent offender to the first offender where the motivation for the offence is clear and does not point to a likelihood of reoffending.

20 It is true the claimant is not a persistent offender in the sense that he does not have previous convictions of a similar nature but neither was this a one-off single act. As the trial judge found in his sentencing notes the claimant's behaviour involved a systematic searching and downloading of

images. That in itself shows a course of conduct comprising of various acts and indicating that the behaviour is not an isolated one-off single act. Although that does not make the claimant a persistent offender, it places the nature of the offence into an important context. The Parole Board considered this as they were entitled so to do.

21 In addition this is not an offence where the motivation is clear and which does not point to a likelihood of reoffending: quite the opposite. Given the denial, the motivation of the offence remains unclear. In addition the parole assessment report concludes that the evidence found on the devices reflects a deviant sexual interest in pre-pubescent and pubescent children and quotes authority for the proposition that deviant sexual interest is one of the most well established predicators of sexual recidivism. An actuarial risk assessment tool placed the claimant in the average category of risk of reoffending and in the opinion of the author of the report persons in that category are expected to reoffend at the rate observed. This was material the Parole Board considered and whilst they were alive to the fact as recorded in the parole assessment report that "denial itself is not an indication of an increased risk of offending" denial must be considered in the context of the prisoner's individual case and circumstances and to my mind in that light, in this case, denial becomes an important consideration.

22 The Parole Board also took into account the fact that the claimant at the time of the preparation of the pre-sentence report had taken no steps to address his offending behaviour and other than counselling in prison (which the claimant says addressed family issues) appears not to have any future plans to address his offending behaviour. At the hearing, the claimant professed no intent to change his activities or lifestyle, and the Parole Board considered that his immediate family environment was not one where they acted as gatekeepers. Yet at the parole hearing there was no intention expressed to change his activities and lifestyle, in fact quite the opposite. As the Board noted, the claimant intends, upon his release, to set up an internet company which will mean that his everyday working life will be conducted in the setting which led to the commission of the index offences. These circumstances could quite properly raise concern about the level of risk posed.

23 Counsel for the claimant relies on the case of *Oyston* (3). In that case, Oyston denied his guilt throughout but had applied to attend a course for sex offenders, which he was unable to attend because he was found unsuitable because of his denial of guilt.

24 Parole was denied to Oyston. The report found that despite denial the risk of reoffending was low, and arose largely from his lifestyle, there was evidence that Oyston intended to change his lifestyle which would reduce the chance of further reoffending. On appeal, the decision to refuse parole

was quashed. The obvious distinguishing factors between *Oyston* and this case is that the claimant has not resolved to change his lifestyle at all and has expressed no desire to address his sexually deviant behaviour: quite the opposite—he seems to have resolved to start upon a career change which will necessarily put him in the very environment in which the offences were committed, and this particularly with regard to the fact noted by the Board that the claimant has extensive knowledge of computer software is important.

25 Mr. Bonfante states that the claimant's desire to set up an internet business should not be held against him because the internet is everywhere and he could have access to it at any time regardless. That may be so but by way of comparison alcohol is everywhere and easily accessible and yet to the recovering alcoholic working in a bar would simply raise the risk of taking a drink. And it is precisely the assessment of risk that the Board are concerned with.

26 The distinction was recognized in the case of *R. (Austin)* v. *Parole Bd.* (1). In that case the claimant denied his guilt and argued that there had been an over-emphasis by the Parole Board of that denial. It was held that the Parole Board had not given undue weight to the denial of guilt. Judge Waksman stating that:

> "There is an important difference between the case of Oyston and this case. Here there was really no material for the Parole Board which could be said to reduce risk. In Oyston however the prisoner had been willing to redress prior sexual behaviour and change his lifestyle the latter being plausibly connected to the question of risk."

In this case the claimant has expressed no such willingness and therefore his denial becomes a more significant issue.

27 Not in dispute that denial of guilt is a legitimate factor for the Board to consider but of course they should guard against placing over reliance upon such a denial. This presents a very difficult task because addressing offending behaviour will often have a link to the reduction of risk. And when denial is protested with vehemence there will often be an absence of effort or inclination to address offending behaviour. In my view, denial of itself is not an indication of increased risk but if denial leads to a refusal to address or modify that behaviour then it becomes an important consideration in the overall assessment of risk. Evident from *Oyston* that it is possible to maintain the integrity of a denial whilst at the same time recognizing that in light of the conviction and the possibility of future release there is a need to address aspects of behaviour in order to mitigate risk.

28 I gave counsel the example earlier of a defendant (also has recently appeared before me) convicted for having sexual relations with a girl

under 16 and who continued to deny his guilt. Notwithstanding, he agreed to modify his behaviour by volunteering to have no contact with girls under the age of 16, and agreed to the terms of a SOPO prohibiting such contact. That to my mind is a classic example of someone who denies guilt but is nevertheless willing to address aspects of their behaviour.

29 In this case the Board noted the claimant is of the view that the sentencing judge was over-sensationalizing the offence. This points to an inability to recognize the seriousness of the offence and instead of showing willingness to adapt his behaviour to take account of the conviction he chooses to place himself in the midst of the very environment through which the offences were committed. The Parole Board, it seems to me, were entitled to place reliance on that in the context of considering the claimant's denial of guilt and in the circumstances the Board did not give undue weight to the question of the claimant's denial of guilt.

*Decision quashed, matter remitted for consideration.*

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