[2021 Gib LR 446]

R. (BEHDAOUI) v. PAROLE BOARD and MINISTER FOR JUSTICE (as interested party)

SUPREME COURT (Ramagge Prescott, J.): August 8th, 2021

2021/GSC/30

Prisons—parole—judicial review—factors to be considered

The claimant sought judicial review of the decision to refuse him parole.

The Parole Board refused to grant the claimant parole because of the risk to the public.

The claimant submitted that the Parole Board took into account irrelevant considerations, including that he had a history of serious criminal offences and that he had committed an offence within 12 months of coming to Gibraltar. The claimant submitted that the Board was wrong to conclude that the offence impacted on the victim or the victim's family so as to cause them fear because the Board had no such information before it. It was also submitted that a proper risk assessment could only be carried out by having regard to his behaviour in prison, which had not been done, and that the Board had failed to carry out a proper balancing exercise.

Held, dismissing the application:

(1) On an application for judicial review of a decision of the Parole Board, the court would only interfere with the decision if it was shown to be one which could not reasonably have been reached by the Board. The court would not substitute its own decision for that of the Board. The weight to be given to relevant considerations was a matter for the Board, as was the assessment of risk. The Board should give particular weight to the need to protect the public against any significant risk of harm when an offender was released. There was a margin of appreciation to be applied in what the Board took into consideration when making its decisions (paras. 1–7).

(2) The Parole Board considered all the relevant information before it, both for and against the claimant. The Board was entitled to give particular weight to particular factors, such as the recommendations of the probation officer, and entitled to place reliance on the recommendations in the context of all the other documentation before it. Schedule 1 to the Prison Act required a wider perspective than simply undertaking a simple assessment of the seriousness of the offence. An assessment of risk was an exercise

that involved consideration of not just the behaviour of the claimant but also the personal circumstances, seriousness of the offence, background and all the matters listed in the Schedule. It was not a black and white exercise, and it was possible that two different Parole Boards exercising their discretion with the same information might reach different conclusions. In the present case, the only matter on which the Parole Board might have erred was in giving weight to the impact of the offence on the victims, because that must be an assumption made in the absence of evidence. That was not a determinative factor in the refusal of parole. The matters which weighed against release were in particular the seriousness of the offence, the unduly high risk to the community and the claimant's offending background. It was clear that in the Board's view those matters outweighed the benefits of the claimant obtaining release. The Board conducted a proper balancing exercise and reached a legitimate and reasonable conclusion. The court would not disturb the decision and the application would be dismissed (paras. 23–26).

Cases cited:
(1) *R.* v. *Parole Bd.*, 2015 Gib LR 91, considered.
(2) *R. (Alvey)* v. *Parole Bd.*, [2008] EWHC 311 (Admin), followed.
(3) *R. (DSD)* v. *Parole Bd.*, [2018] EWHC 694 (Admin); [2019] Q.B. 285; [2018] 3 W.L.R. 829; [2018] 3 All E.R. 417; [2018] HRLR 12, followed.
(4) *R. (Fewings)* v. *Somerset County Council*, [1995] EWCA Civ 24; [1995] 1 W.L.R. 1037; [1995] 3 All E.R. 20; (1995), 7 Admin LR 761, referred to.
(5) *R. (James)* v. *Justice Secy.*, [2009] UKHL 22; [2010] 1 A.C. 553; [2009] 2 W.L.R. 1149; [2009] 4 All E.R. 255; [2009] UKHRR 809; [2009] HRLR 23; [2009] Prison LR 371, followed.
(6) *R. (Samuel)* v. *Parole Bd.*, [2020] EWHC 42 (Admin), referred to.

N. Gomez (instructed by Charles Gomez & Co.) for the claimant;
G. Licudi, *Q.C.* with *C. Bonfante* (instructed by Hassans) for the claimant;
K. Drago (instructed by the Office of Criminal Prosecutions & Litigation) for the interested party.

1 **RAMAGGE PRESCOTT, J.:** The governing law (when granting parole) is found in the Prison Act, more specifically in Schedule 1 to that Act, s.1(1) and (2). In addition, the governing general principles of law to be applied in judicial review have been highlighted by counsel. Those can be summarized as follows: Sir Brian Leveson in *R. (DSD)* v. *Parole Bd.* (3) made it clear that the evaluation of risk ([2018] EWHC 694 (Admin), at para. 117):

> ". . . central to the Parole Board's judicial function, is in part inquisitorial. It is fully entitled, indeed obliged, to undertake a proactive role in examining all the available evidence and the submissions advanced,

> and it is not bound to accept the Secretary of State's approach. The individual members of a panel, through their training and experience, possess or have acquired particular skills and expertise in the complex realm of risk assessment."

2 Sir Brian further quoted Stanley Burnton, J. in *R. (Alvey)* v. *Parole Bd.* (2), saying that ([2008] EWHC 311 (Admin), at para. 26):

> "The law relating to judicial review of this kind may be shortly stated. It is not for this court to substitute its own decision, however strong its view, for that of the Parole Board . . . The weight it gives to relevant considerations is a matter for the Board, as is, in particular, its assessment of risk, that is to say the risk of re-offending and the risk of harm to the public if an offender is released early, and the extent to which that risk outweighs benefits which otherwise may result from early release, such as a long period of support in the community, and in some cases damage and pressures caused by a custodial environment."

3 I also draw guidance from the case of *R. (James)* v. *Justice Secy.* (5) and the principles enunciated therein which are that ([2010] 1 A.C. 553, at para. 134):

> ". . . it can only be in an extreme case that the Administrative Court would be justified in interfering with the decisions of what, for present purposes, is the 'court' vested with the decision whether to direct release, and therefore exclusively responsible for the procedures by which it will arrive at its decision."

4 It is clear that the authorities point to the fact that the Parole Board should give particular weight to the need to protect the members of the public against any significant risk of harm when the claimant is released, and indeed that is reflected in statute.

5 Although not specifically referred to in the course of his submissions, Mr. Licudi in his skeletons, makes the point that where it is alleged that the Parole Board has taken an irrelevant factor into account, it will be for the claimant to show that this factor materially or substantially interfered with the decision of the Parole Board, and for that submission he relies on *De Smith's Judicial Review*.

6 Both parties have cited the case of *R. (Fewings)* v. *Somerset County Council* (4), and the guidance to be drawn from that case is that there is a margin of discretion to be applied in what a Parole Board takes into consideration when making its decisions.

7 I am grateful to Mr. Licudi for summarizing the legal principles applicable to judicial review in his skeletons which are helpful, most importantly I note that better than repeat them now:

> "The court will only interfere with a decision of the Parole Board when the decision is shown to be one which could not reasonably have been reached by the Parole Board."

8 The decision of the Parole Board in this case is supported by the minutes of a meeting dated April 30th, 2021, a letter to the claimant communicating the decision of the Parole Board dated May 24th, 2021, and a witness statement of the Chairman of the Parole Board, Mr. Baldacchino, explaining the process dated July 26th, 2021.

9 Mr. Gomez's first submission is that the Parole Board took into account irrelevant considerations. In the first place that the claimant had a history of serious criminal offences. Mr. Gomez admits that whilst this [implies] that the claimant has been in prison numerous times, in fact he has only been in prison once, for some considerable time, from 2004 to 2013. There is some uncertainty before me as to how many times and during what period of time precisely the claimant has been incarcerated.

10 There was a document put before me in the Spanish language which I understand was also before the Parole Board which refers to a period of incarceration. The document states that the claimant was in prison from 2004 to 2013. That appears to be in some contradiction to what the claimant himself has told the probation officer. He states in the first report that he was released on licence and completed his sentence in 2013 and then, in the second report, the claimant says that he has never been released from parole. It is not, I think, my role to investigate precisely what terms of imprisonment the claimant has served or not served. I am satisfied on the documentation that the Parole Board had before it, in particular, the Parole Officer's reports and the Chief Justice's sentencing remarks, that there was documentation from which it was reasonable for the Parole Board to conclude that the claimant had a history of previous offending. The claimant himself told the probation officer that he had a conviction for robbery with violence, for intimidation in an inhabited house, and he had two previous offences for illegal detention. The Chief Justice, in his sentencing notes, referred to the previous convictions for robbery with violence and for illegal detention. Mr. Gomez submits that that is not accurate and that there is in fact only one previous conviction and that that in itself cannot amount to a history of previous offending. We could embark upon a lot of debate the semantics of the meaning of the word "history." The point, in my view, is that the Parole Board was entitled, on the evidence before them, to conclude that the claimant had offended in the past and even if it turns out to be on only one previous occasion, to my view that can properly be described as a history.

11 Mr. Gomez further submits that the Parole Board were wrong to take into consideration that the claimant had committed an offence within 12 months of his coming to Gibraltar. It is true that there is not a specific

ground set out on the schedule with reference to previous offending history but, in my view, the Parole Board did not take this into consideration in isolation, nor did they rely on this as a ground for refusing parole. Rather, they considered that as part of the claimant's background as they were entitled to do pursuant to s.1(2)(ii) of Schedule 1 of the Prison Act. Mr. Gomez further submits that whilst the seriousness of the offence is in proper consideration, the Parole Board did not consider it in the appropriate way. He submits that the Parole Board must consider whether the claimant presents an unacceptable risk of re-offending in relation to the seriousness of the offence and that the only way the Parole Board can do that is by looking at the claimant's behaviour whilst in prison. Mr. Gomez submits that what the Parole Board cannot do is rehearse the exercise of the sentencing court, and he submits that the Parole Board has done precisely that. Mr. Gomez is of the firm view that the only way a proper risk assessment can be carried out is by having regard to his behaviour in prison and Mr. Gomez says, in this case, that has not been done.

12 Mr. Licudi submits that the issue of seriousness for the sentencing judge and for the Parole Board is viewed from a different perspective, and that the Parole Board must take seriousness into account in the context of assessment of future risk. Certainly, in the local case of *Garcia* (1) (reported *sub nom. R.* v. *Parole Bd.*, 2015 Gib LR 91) the Chief Justice made it clear that the issue of seriousness is not just a matter for the sentencing judge, seriousness was an issue for the Parole Board in the context of a risk assessment to the public. I do not dispute that a claimant's behaviour is a factor to consider in relation to the assessment of what risk he presents upon release, but I am satisfied on the papers before me, that the claimant's behaviour was considered and that the minutes so reflect that.

13 Consideration of the minutes will reflect that the Prison Superintendent had prepared a report which was presented to the court and which discussed the behaviour of the claimant, not just his good behaviour, of which there were various comments, but also the fact that he was placed on report on June 23rd, 2020 and found guilty of using threatening, abusive or insulting words. What the minutes do indicate is that the matter of the claimant's behaviour was discussed at the parole hearing. In my view, therefore, it was a factor which was taken into consideration in relation to seriousness.

14 Mr. Gomez makes reference to the refusal letter issued by the Parole Board and in particular to the fact that the Parole Board was of the view that the risk to the community was unduly high and there was a risk to the claimant himself. Mr. Gomez submits that s.2(f) of the schedule to the Prison Act is [unintelligible] those heinous types of offences and he says that the attitude of the local community referred to in the Act must be referred to circumstances where the crime is so heinous that the community would take great issue with the release of a claimant. With respect to Mr.

Gomez, that is his interpretation of the Act which I do not share and there is no authority in support of that proposition.

15 Mr. Gomez raises the issue that consideration of the claimant causing himself harm was not a relevant consideration and should not have been considered by the Board. I think it is of note and particularly relevant that it was the claimant himself who raised the issue with the probation officer that he would be at risk of harm if he was released. Once a matter such as that is brought to the attention of the probation officer and indeed to the Board, it is a matter which, in my view, it is entitled to consider. The parole officer asked for more information but the police were able to neither confirm nor deny the claimant's allegation. In any event, in my view, the fact that this had been raised by the claimant at interview with the probation officer, puts it within the remit of the Parole Board and it was entitled to consider it. That said, this consideration was not one which was the sole reason for the Parole Board's refusal. It is clear from documentation before me that the determinative reason for refusal was the risk to the public and harm and not the risk of the claimant himself being harmed. Mr. Gomez makes the fair point that it is not the duty of the Parole Board to protect the claimant by refusing him his release but I am satisfied that that was not the Parole Board's intention or motivation and that they were entitled to consider the issue of harm raised by the claimant as indeed they did.

16 A further matter raised by Mr. Gomez is that the Parole Board was wrong to conclude that the robbery impacted upon the victim or the victim's family in a way that caused them fear because he says the Board had no information of the impact upon the victim or the victim's family before it. Whilst I am of the view that this could be a proper consideration for the Parole Board to have considered, my concern is that there was no evidence before the Parole Board other than an assumption that fear must have been felt by the victim, nor was there any evidence of any impact upon the victim. The Parole Board, in my view, was entitled to discuss whether upon the facts of this case and the documentation before them, the victim must or may have felt fear but in my view, only limited reliance could be placed upon that in the absence of any evidence from the victim in support.

17 Mr. Gomez for the claimant further submits that the decision of the Parole Board is unsafe because they failed entirely to carry out a proper balancing exercise. Mr. Gomez says, in particular, that the Parole Board failed to consider the claimant's background, that he was married with two children, although I think from the papers I read the children were not so much children as adults. He says that the Board failed to give credit for the fact that the claimant had turned Queen's evidence. They failed to consider his good behaviour in prison and they failed to consider whether the claimant posed any risk to other persons and if they had done that would have reflected positively on the claimant. Mr. Gomez relies on the case of

R. (Samuel) v. *Parole Bd.* (6) for the proposition that, as in that case, the Parole Board here did not carry out a proper balancing exercise and there has been no attempt to balance risk against benefit which is a requirement. To my mind, there is evidence of the Parole Board carrying out a balancing exercise and that is to be found in the minutes and in the letter addressed to the claimant.

18 Mr. Licudi submits that the chairman's written statement supplements the minutes. I treat that with some caution. I do not dispute that that may be the case but I am cautious not to allow the witness statement to be used to fill any gaps which there may be in the minutes or in the letter. That said, I bear in mind that the minutes are not a transcript, they are simply a summary of what transpired in the meeting, that is important and I bear it in mind in the context of these proceedings. The minutes, for example, say that the Parole Board considered the risk to the public of further re-offending and considered whether that risk is acceptable. We do not have details of the conversation, but from that entry we can be satisfied that there is evidence that a conversation on that subject matter was had, and that is the purpose of the minutes.

19 Mr. Licudi submits that the letter to the claimant is not one and the same as the decision of the Parole Board. It is the decision of the Parole Board which is being reviewed and not the contents of the letter. The letter does not contain the balancing exercise, the balancing exercise was carried out at the meeting and the minutes reflect what happened at the meeting. I think that must be right.

20 So I now turn to consider whether the minutes evidence that the balancing exercise was carried out. Turning to the minutes, it is evident at p.2, as I have already made some reference to, that there was some information put before the Board in relation to Mr. Behdaoui's behaviour in prison. There is an introductory paragraph alluding to the fact that he took some time to adjust to prison life, there is information that he was placed on report and found guilty of using threatening and abusive words. There is further information that he settled down, that he attended educational classes, he used the gym, was responsible for laundry and was visited regularly by his wife. There was a further report which confirmed that the claimant continued to behave in an excellent manner and that the incident of misconduct appeared to be a one off. The minutes then turn to the parole assessment report and the contents of that report are briefly described. Importantly, the minutes set out eleven documents which were before the Board. The parole dossier, the parole assessment report, the addendum parole assessment reports of October 2020 and April 2021, the prison parole report, the addendum to the prison parole reports, list of previous convictions local, list of previous convictions United Kingdom, list of previous convictions Spain, a prison letter on voluntary drug testing,

an updated counsellor's report, and the written submissions of Mr. Gomez. The minutes then go on to summarize the submissions made by counsel, after which there is a reference that the Board proceeded to conduct the exercise as to whether safety of the public would be placed unacceptably at risk and, specifically, there is reference to the fact that the Board considered the risk to the public of further offence being committed by the inmate at a time when he would otherwise be imprisoned and whether such a risk was acceptable and in doing so balanced the benefit to both the inmate and the public, of the inmate being released back into the community.

21 After that there is a specific reference to the fact that the Parole Board proceeded to conduct the exercise. They set out all relevant factors and in particular there is a list of factors which they consider. I do not propose to read those out.

22 It is clear that some of the documents which were before the Parole Board are quite detailed, many are positive and in the claimant's favour, others are not. I remind myself that mine is not the role to debate whether I ought to have come to the same conclusion as the Parole Board but rather to decide whether the Parole Board has conducted a proper exercise in accordance with the Prison Act. Those factors which they gave particular consideration to towards the end of their minutes make it clear that they did not just focus on factors which were disadvantageous to the claimant but factors which were in his favour and to his benefit. That of itself is a clear indication of a balancing exercise.

23 I am satisfied the Parole Board considered all the relevant information before it, both for and against the claimant, that which benefitted him and that which did not. They were entitled to give particular weight to particular factors such as the recommendations of the probation officer, and they were entitled to place reliance on the recommendations in the context of all the other documentation they had before them. I remind myself of the Chief Justice's view in the case of *Garcia* (1) that Schedule 1 requires a wider perspective than simply undertaking a simple assessment of the seriousness of the offence. That case was described as a borderline case in which the probation officer recommended release. The Chief Justice made a comment that (2015 Gib LR 91, at para. 22) "the schedule enjoins me to 'take into account that safeguarding the public may often outweigh the benefits to the prisoner of early release'. . ." and that is vitally important. Provided the Parole Board have conducted themselves lawfully, they are entitled to reach a conclusion which can properly be reached on the information before me.

24 An assessment of risk is an exercise that does involve consideration of not just the behaviour of the claimant but also the personal circumstances, seriousness in the offence, background and all those matters listed in the

schedule. It is not a black and white exercise and it is indeed even possible that two different Parole Boards exercising their discretion with the same information before it reach different conclusions.

25 I do not think it is in dispute that the court has a wide discretion in determining these kinds of issues. Mr. Licudi submits that even if the court is satisfied that the claimant has been successful in some of his submissions, it still has a discretion to exercise, whether to quash the decision or not.

26 I agree. In my view, the only matter on which the Parole Board may have erred was in giving weight to the impact of the offence upon the victims because that must be an assumption made by them in the absence of any evidence. In my view, that was not a determinative factor which propelled the refusal of parole. The matters which weighed against release were in particular the seriousness of the offence, the unduly high risk to the community and the claimant's offending background. It is clear that in the view of the Parole Board those matters outweighed the benefits of the claimant obtaining release. In my view, the Parole Board has conducted a proper balancing exercise and reached a legitimate and reasonable conclusion at the conclusion of that exercise and therefore I do not disturb their decision and the application is dismissed.

Application dismissed.