[2021] EWCA Civ 1394

Case No: C1/2020/1883

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23rd September 2021

Before :

LORD JUSTICE FULFORD (VICE-PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION)
LORD JUSTICE COULSON
AND
LORD JUSTICE HADDON-CAVE

- -

Between :

THE QUEEN (ON THE APPLICATION OF NEIL HUXTABLE)

Appellant

and

SECRETARY OF STATE FOR JUSTICE

Respondent

and

PAROLE BOARD

Interested Party

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- -

Jude Bunting (instructed by SL5 Legal / Tuckers Solicitors) for the Appellant
Sir James Eadie QC and Jason Pobjoy (instructed by Government Legal Department) for the Respondent

Hearing date : 14th July 2021

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Judgment Approved by the court for handing down

Lord Justice Haddon-Cave:

Introduction

1. This case concerns a challenge to the rule change introduced by the Parole Board Rules 2019 on 22nd July 2019 granting a prisoner or the Secretary of State a 21-day period to apply for an administrative review of a Parole Board decision ("the Reconsideration Mechanism"). The Appellant submits that the Reconsideration Mechanism is (a) *ultra vires* the Criminal Justice Act 2003, (b) incompatible with Article 5(1) ECHR and (c) incompatible with Article 5(4) ECHR.

2. On 8th May 2008, the Appellant was convicted of robbery and received an imprisonment for public protection ("IPP") sentence with a minimum term of two years 245 days. The Appellant's minimum term expired on 9th January 2011, whereupon he became eligible for release subject to the decision of the Parole Board.

3. The Parole Board considered the Appellant's case on 23rd January 2019, 20th June 2019 and 20th August 2019. Over the course of these three hearings, the Parole Board heard oral evidence from the Appellant, his supervisors, offender managers and psychologists. In a written decision dated 21st August 2019, the Parole Board directed the Appellant's release, subject to a licence condition that he reside at an approved premises in Mandeville House, Cardiff. The decision noted that a bed was available at the approved premises from 23rd August 2019.

4. The Parole Board's decision was subject to the Reconsideration Mechanism under the 2019 Rules. The Appellant was released later on 12th September 2019, just over three weeks after the written decision of 21st August 2019.

5. The Appellant subsequently applied for judicial review challenging the legality of the Reconsideration Mechanism and its application in his case.

6. On 26th June 2020, the claim was heard before Fraser J in the Administrative Court. Fraser J rejected the Appellant's judicial review claim on 18th September 2020 and refused permission to appeal on 30th September 2020. On 5th February 2021, permission to appeal was granted by a single Lord Justice.

Parole Board Rules 2019: The Reconsideration Mechanism

7. The Parole Board is a statutory body that was established in 1968 under s.59 of the Criminal Justice Act 1967. Its current statutory provisions are to be found in s.239 and Schedule 19 to the Criminal Justice Act 2003 ("the 2003 Act"). The Parole Board carries out risk assessments on prisoners to determine whether they can be safely released into the community.

8. Section 28(7) of the Crime (Sentences) Act 1997 ("the 1997 Act") entitles a prisoner who is the subject of an indeterminate sentence to have his case referred to the Parole Board by the Secretary of State at any time after he or she has served their minimum term, and to a further referral to the Parole Board by the Secretary of State every two years thereafter. Pursuant to s. 28(6), the Parole Board has the

power to direct the release of the prisoner if "the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined". After such a direction has been made, the Secretary of State has a duty to release the prisoner on licence pursuant to s.28(5) of the 1997 Act. A similar test applies to the re-release of prisoners recalled to custody pursuant to s.32 of the 1997 Act.

9. In 2018, a public consultation took place regarding a number of measures designed to improve the existing Parole Board Rules 2016, including introducing a mechanism which would allow a prisoner or the Secretary of State to request an internal administrative reconsideration of the Parole Board decision on grounds similar to bringing a judicial review without recourse to the courts (the Reconsideration Mechanism). A response to that consultation was published in February 2019: *"Reconsideration of Parole Board decisions: creating a new and open system: Government response to the public consultation*" (February 2019). The Executive Summary to the Consultation Response recorded (at paragraph 4):

> "At present, the only way to challenge parole decisions is through the courts by seeking a judicial review. While this is an effective form of scrutiny, it can be a costly, complex, time-consuming and intimidating process, especially for victims of crime. The *Worboys* case was unusual in many ways but it shone a light on the need to have a more accessible way to review parole decisions in those rare cases where the decision may be flawed. The majority of consultation respondents welcomed the possibility of having an alternative way to review decisions and the Government has decided that we should proceed to make provision in the Parole Board Rules to implement a new reconsideration mechanism".

10. The Parole Board Rules 2019 ("the 2019 Rules") were made by the Secretary of State under powers set out in ss.239(5), 330(3) and 330(4) of the 2003 Act. Under the 2019 Rules, the Parole Board must decide whether the prisoner is suitable for release or whether the case should be directed to an oral hearing (rule 19). Under the Reconsideration Mechanism any direction for release following a paper review or an oral hearing is provisional and is only finalised if no application for reconsideration is received (see further below).

11. The Reconsideration Mechanism is set out in rules 5, 19 – 21, 25 and 28 of the 2019 Rules. It is helpfully summarised in the Respondent's skeleton as follows:

    (1) A prisoner or the Secretary of State may apply to the Parole Board for a case to be reconsidered on the grounds that the decision is irrational or procedurally unfair (rule 28). This procedure is only available where the prisoner is serving an indeterminate sentence, an extended sentence, or a determinate sentence subject to initial release by the Board under Chapter 6 of Part 12 of the 2003 Act (rule 28(2)).

    (2) A reconsideration application must be made within 21 days of the Parole Board's decision, at which time the provisional decision will become final if no application is received (rules 19(4), 25(2)).

(3) Where an application is made, the other party has 7 days to make representations (rule 28(4)).

(4) If an application is made, it is considered on the papers by an assessment panel, comprising one or more members of the Parole Board (rules 2, 5(4), 28(5)).

(5) The assessment panel may direct that the provisional decision be reconsidered only if it has identified that the decision is irrational or procedurally unfair (rule 28(7)).

(6) The assessment panel may direct that the provisional decision should be reconsidered on the papers or at an oral hearing by the previous Parole Board panel, or by a new Parole Board panel (rule 28(9)).

The Judgment below

12. The issues for decision by the Administrative Court were threefold:

(1) Whether the 2019 Rules were *ultra vires* the powers of the Parole Board.

(2) Whether the 2019 Rules were in breach of Article 5(1) ECHR.

(3) Whether the 2019 Rules were in breach of Articles 5(4) ECHR

13. In a comprehensive judgment, Fraser J answered the first question in the negative holding that the 2019 Rules did not have the effect of removing any substantive powers from the Parole Board. The Judge held:

> "66. In my judgment, imposing a procedural interval into the process whereby the Parole Board comes to a final decision to satisfy itself that the assessment of risk is such that the prisoner can be released does not remove a substantive power of the Parole Board. That period runs in parallel with a period in any event required for such prisoners for the satisfaction of conditions, what is called the release plan. The provisional decision to release by the Parole Board commences this process. Once the process is completed, with the 21-day period having elapsed, if no application for reconsideration is made, the provisional decision becomes a final one. This disposes of the Claimant's argument that the 2019 Rules are not procedural but are substantive, which underpins [his] claim that the 2019 Rules are *ultra vires*."

14. On this question, he concluded:

> "74. No aspect of the substantive decision making has been removed from the Parole Board by reason of the 2019 Rules. The pre-2019 Rules powers of the Parole Board cannot be construed in the way contended for by the Claimant, based on the authority of *Bowen* in the Court of Appeal. A decision of the Parole Board with conditions does not mean that the prisoner must be released immediately, for all the

reasons (including those of practicality) identified in the cases at [60] to [65] above. What the 2019 Rules have done is now to create a two-step process, whereas before there was one. The first step is arriving at the provisional decision. The second step is the finalisation of that provisional decision. Both steps are necessary procedural stages for the Parole Board to arrive at the point whereby it has satisfied itself, although the second step becomes a purely administrative one if no request for reconsideration is made under Rule 28 by either party. At all stages the decisions are made by the Parole Board, and it has lost none of the substantive powers that it had before introduction [sic] of the 2019 Rules. When analysed in this way, it can be seen that the Reconsideration Mechanism in the 2019 Rules is indeed procedural, and within the power granted to the Defendant under section 239(5) of the CJA 2003. It follows therefore that the *ultra vires* ground of challenge fails".

15. Fraser J also answered the second and third questions in the negative and held that the 2019 Rules were not in breach of Article 5(1) or Article 5(4). The Judge considered that the core issue regarding Article 5(1) was whether, after a provisional decision of the Parole Board to release a prisoner, there is "a sufficient causal connection between the conviction and the deprivation of liberty at issue" [79]. This challenge failed because the Judge found that the Claimant's submissions proceeded on a misapprehension, namely "on the basis that the provisional decision of the Parole Board can be equated to a final decision. When proper consideration is given to the fact that the decision is – as with this one – expressly stated to be provisional, then any force in the Claimant's submissions, eloquently and carefully put as they were, falls away" [94].

16. The central issue regarding Article 5(4) was the delay that the Claimant submitted would be caused. The Judge considered the fact that a prisoner could apply to reduce the 21-day period was "crucial" [101]. Consequently, the Judge disagreed with the Claimant's contention that the 2019 Rules were a blanket policy. The Judge did not consider that "any potential delay that might occur in some isolated cases…and where a prisoner chooses not to make an application to reduce time" [106] was sufficient to infringe Article 5(4).

Grounds of Appeal

17. The Appellant raised three similar grounds of appeal:

Ground 1: The Reconsideration Mechanism is *ultra vires* the Secretary of State's rule making powers under s.239(5) of the 2003 Act.

Ground 2: The Reconsideration Mechanism is in breach of Article 5(1).

Ground 3: The Reconsideration Mechanism is in breach of Article 5(4).

Ground 1 – *Vires*

Appellant's submissions on Ground 1

18. Mr Bunting submitted on behalf of the Appellant that the Reconsideration Mechanism introduced by the 2019 Rules was outwith s.239(5) of the 2003 Act because it deprived the Parole Board of a substantive power which it had previously enjoyed, namely effecting the immediate release of a prisoner.

19. He submitted that the effect of s.28(5) of the 1997 Act was that when the Parole Board directed a prisoner's release, the Secretary of State must release the prisoner immediately. The only delay allowed is where a reasonable time is required to put in place necessary licence conditions: *R (Bowen and Stanton) v Secretary of State for Justice* [2018] 1 WLR 2170. Where there are no licence conditions, however, s.28(5) requires immediate release. On this basis, Mr Bunting argued that whereas previously the Parole Board could make a binding release decision for immediate release, under the 2019 Rules, it could only make a provisional decision for release after determining that the prisoner's risk did not require his further detention. He submitted that s. 239(5) allowed the making of procedural rules only and did not permit the removal of the prior substantive power. He further submitted that the Reconsideration Mechanism infringed the fundamental common law right to liberty.

Respondent's submissions on Ground 1

20. Sir James Eadie QC submitted on behalf of the Respondent that the 2019 Rules giving effect to the Reconsideration Mechanism regulated the *process* by which the Parole Board's decisions become final, therefore are clearly "rules with respect to the proceedings of the Board" as per s. 239(5). The 2019 Rules do not infringe on the substantive function of the Parole Board, but simply dictate a process by which that final decision is made. Sir James contended that the Parole Board retains the power to make a binding release decision pursuant to ss. 28 and 32 of the 1997 Act. However, the decision will only be finalised 21-days after the provisional decision, which allowed an opportunity for the Parole Board, at the invitation of either the prisoner or the Secretary of State, to reconsider its decision. Sir James further submitted that Mr Bunting's common law submission did not get off the ground because the 2019 Rules themselves do not violate any fundamental right.

<u>Analysis</u>

21. Ground 1 is a straightforward challenge to the *vires* of the 2019 Rules. As such, it raises a simple question of interpretation of the statutory power which enables the 2019 Rules and whether the Reconsideration Mechanism was thereby properly authorised. The manner in which the 2019 Rules operate in practice is not germane.

22. It is clear that s.239(5) of the 2003 Act authorises the making of procedural rules only, not substantive rules:

> "s.239(5) The Secretary of State may make rules with respect to the proceedings of the Board, including proceedings authorising cases to be dealt with by a prescribed number of its members or requiring cases to be dealt with at prescribed times." (emphasis added)

23. It is equally clear, in my view, that the Reconsideration Mechanism introduced by the 2019 Rules is procedural in nature, not substantive. In simple terms, it creates the concept of a provisional decision which remains provisional - and subject to reconsideration for 21 days - until it becomes final. As William Davis J explained in his pellucid judgment in *R (Secretary of State for Justice) v The Parole Board and Walker* [2020] EWHC 2390 (Admin) at [34]:

> "[34] …The scheme in Rule 28 for reconsideration of a decision to release. It is relatively narrow in its scope but the same applies to the supposed jurisdiction of re-referral. It sets a time within which the application for a reconsideration must be made. The scheme avoids any issue of functus or finality because it creates the concept of a provisional decision. Any decision to release will always be provisional if it relates to a sentence which in the first instance involved a finding of dangerousness or to a determinate sentence subject to initial release by the Board."

24. The 2019 Rules did not remove any substantive power from the Parole Board. They merely inserted a procedural stage to allow a period for reconsideration.

25. A similar mechanism existed in the 2016 Rules in respect of the right to an oral hearing. Under Rule 15, decisions of the Parole Board were treated as 'provisional' for a period of 28-days to enable a prisoner to apply for an oral hearing, after which period the decision becomes final. This has been replicated in rule 20 of the 2019 Rules which is expressly a "provisional decision on the papers". It has never been suggested that that was anything other than a procedural rule which was within *vires*. Mr Bunting's answer that rule 20 and its precursor were not an analogue for rule 28 (the Reconsideration Mechanism) because the fact that oral hearings may be required under Article 5 provides no answer to the correct characterisation of rule 20 (and rule 28) as plainly procedural.

26. Mr Bunting's argument that the Reconsideration Mechanism deprives the Parole Board of the power to make a binding decision for immediate release is based on a fundamental misunderstanding. As Fraser J correctly pointed out, Mr Bunting's argument wrongly assumes that "the provisional decision of the Parole Board can be equated to a final decision" [94]. It cannot. Mr Bunting's failure to distinguish between these two concepts is the fatal flaw in his case. As explained above, the Parole Board's decision to release is initially *provisional* and it is only on the expiry of the 21-day reconsideration period does it become *final* in the sense of being operative and binding. Up until that moment, the decision remains provisional and inchoate - or, in Sir James' vernacular, a 'we are minded to' decision.

27. In any event, as Fraser J found, Mr Bunting is incorrect to suggest that s.28(5) gives the Parole Board the power to insist on immediate release. As the caselaw

shows, it does not. Fraser J cited McCombe LJ in *R (Bowen and Stanton) v Secretary of State for Justice* [2017] EWCA Civ 2181 citing Langstaff J in *R (Elson) v Greater Manchester Probation Trust* [2011] EWHC 3692 at [61]:

> "[23] …s 28 of the 1997 Act cannot sensibly be interpreted to provide that as soon as a Parole Board takes a decision in which it directs release, albeit under conditions or at some future time, the Secretary of State is under a duty there and then and thereby to ensure that that release takes place forthwith. That would give no effect to the provisions of s.31; it would not recognise the difference in language between s.28 and s.32; it would in my view simply have been beyond the contemplation of Parliament that the alternative… would operate in an impractical way…"

28. Further, Mr Bunting's attempt to draw a comparative analysis between the pre- and post- 2019 Rules position is misconceived. The issue for determination is a simple one of *vires*: whether the 2019 Rules fall within the enabling language of s.239(5). It matters not that the Reconsideration Mechanism did not exist previously.

29. Mr Bunting's submissions on the infringement on the right to liberty will be considered with his Article 5 grounds below.

30. In summary, in my judgment, the Reconsideration Mechanism is procedural in nature and does not alter the Parole Board's substantive powers under section 28 of the 1997 Act which remain untouched. The position is straightforward: the Reconsideration Mechanism introduces a procedure by which the Parole Board indicates in the first place a provisional decision, *i.e.* one that it is minded to make, and allows the parties a 21-day period of grace to point out any potential errors of law, failing which the provisional decision automatically become final, *i.e.* binding and operative.

<u>Grounds 2 and 3 – *Articles 5(1) and 5(4)*</u>

Article 5

31. Article 5 of the ECHR provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable

suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

…

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

32. It is axiomatic that Article 5(1) requires there to be "a sufficient causal connection between the conviction and the deprivation of liberty at issue" under Article 5(1)(a) in order for a prisoner's detention under a life or indeterminate sentence to be lawful: *R (Haney and others) v Secretary of State for Justice* [2015] AC 1344, [26].

Appellant's submissions on Ground 2 and 3

33. Mr Bunting submitted on behalf of the Appellant as regards Article 5(1) that the Parole Board release direction represented a break in the causal connection between conviction and the deprivation of liberty. The Reconsideration Mechanism allows the detention of a prisoner even where the Parole Board has decided that their risk does not require further detention. Mr Bunting contended that Article 5(1) requires immediate release as soon as the Parole Board's release decision is made and does not permit a 21-day delay to release. The Reconsideration Mechanism in breach of Article 5(1) transforms the final determination of release into a provisional decision and unlawfully delays release.

34. Mr Bunting further submitted that Article 5(4) requires post-tariff detention to be speedily reviewed by a Court. Mr Bunting argued that the Reconsideration Mechanism is a blanket policy that unlawfully delays the release of every indeterminate prisoner, irrespective of the personal characteristics of their case such as individual risk.

Respondent's submissions on Ground 2 and 3

35. Sir James submitted on behalf of the Respondent as regards Article 5(1) that the chain of causation was not broken when the Parole Board made its provisional decision, because the relevant decision – *i.e.* the final and binding decision - had not been taken. He further submitted that, in any event, first, the detention during

this period was justifiable on grounds of risk as the reconsideration period ensures that the Parole Board's decision did not suffer from a procedural defect or error of law, and second, there is a mechanism in place for the prisoner to apply to shorten the 21-day provisional period.

36. Sir James contended that there was no Article 5(4) infringement as the Secretary of State's obligation to ensure the speedy review of an individual prisoner's case remains unchanged. Sir James pointed out that the evidence showed that the Reconsideration Mechanism would not delay the release of prisoners in the majority of cases as the Impact Assessment conducted stated that in 81% of the cases eligible for reconsideration, release takes longer than 21-days.

Analysis

37. The short answer to Mr Bunting's arguments on Article 5 is that they are parasitic on his earlier argument on Ground 1 and fail for similar reasons. There is no 'delay' in the system under the 2019 Rules: as explained above, the Parole Board decision to release does not become final, binding and operative until the expiry of the 21-day reconsideration period; until that moment, the decision remains provisional, non-binding and subject to reconsideration.

38. Mr Bunting relied on *R (Noorkoiv) v Secretary of State for the Home Department* [2002] 1 WLR 3284 where the Court of Appeal found that the Parole Board's policy of conducting reviews three months after the expiry of a prisoner's term was unlawful, because it treated "every case alike, and imposes delays for reasons that are unrelated to the nature or difficulty of the particular case". Mr Bunting contended that *Noorkoiv* shows that the delay of 21 days in the present case which is unconnected to the individual circumstances of the case is in breach of Article 5(4). In my view, his reliance on *Noorkoiv* is misconceived for the reasons stated above.

39. In any event, the Judge was right to hold that this case does not assist the Appellant. Firstly, in *Noorkoiv*, the delay was for three months. In the present case, the evidence shows that it is likely that in the majority of cases there will be no delay. The Impact Assessment states that only in 19% of cases would there be an average of a 7-day delay to release. Secondly, the Reconsideration Mechanism is not a blanket policy: the Reconsideration Mechanism allows a prisoner or the Secretary of State to shorten the 21-day period. Therefore, prisoners affected by the 21-day period can apply for an adjustment to suit their individual case. Thirdly, the Reconsideration Mechanism process provides a speedy mechanism to ensure that decisions about the liberty of the subject are soundly based. Before the 2019 Rules, the only route open to prisoners and the Secretary of State was the relatively time-consuming and expensive process of judicial review. The utility of the Reconsideration Mechanism is demonstrated by the data which shows that, in practice, it is used ten times more often by prisoners than the Secretary of State.

40. It follows that Mr Bunting's argument that the 2019 Rules violate the Appellant's fundamental right to liberty it is misconceived. Moreover, it arguable that a prisoner's liberty is further protected, not infringed, by the Reconsideration Mechanism.

Conclusion

41. For the above reasons, in my judgment, the Appellant's appeal on all three grounds should be dismissed.

Lord Justice Coulson

42. I agree.

Lord Justice Fulford (Vice-President of the Court of Appeal Criminal Division)

43. I also agree.