[2019] EWHC 2238 (Admin)

CO/5202/2018

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

Royal Courts of Justice

Wednesday, **31 July 2019**

Before:

Ms Alison Foster QC
(Sitting as a Deputy Judge of the High Court)

Between:

- -

The Queen on the Application of Welsh

Claimant

v

Secretary of State for Justice

Defendant

- -

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Mr J. Bunting (instructed by Instalaw) appeared on behalf of the Claimant.

THE DEFENDANT was not present and was not represented.

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JUDGMENT

THE DEPUTY JUDGE:

1. This is an application for judicial review of the decision of the Parole Board made on 3 October 2018 in respect of the claimant, Mr Welsh, who is currently serving an indeterminate sentence for public protection, an "IPP sentence".
2. The issue the court is required to resolve is whether, when deciding that the claimant not be afforded an oral hearing of his application for release following recall, the Parole Board approached the question lawfully.
3. It is the submission on behalf of the claimant that the single member of the Parole Board panel who decided there was to be no oral hearing, applied the wrong test and the court should, therefore, quash the decision of 3 October.
4. Before me, Mr Bunting, who appeared for Mr Welsh, asked the court, in the particular circumstances of the current case, to direct that there should be an oral hearing of Mr Welsh's application before the Board.
5. The Secretary of State adopts a neutral position on the application. In a letter dated 20 December 2018, he set out his policy and position in that regard in some detail and he has chosen not to address the court orally or in writing upon the merits.

Relevant Factual Background

6. The claimant was born on 13 July 1985 and has a significant criminal record with an offending history dating back to his early youth. He has been described as a "deeply-damaged" individual and has in the past been diagnosed as suffering from, among other psychological difficulties, an emotionally-unstable personality disorder (although by 2014, the professional view was that he did not display the facets of it), and also

obsessive-compulsive disorder. He spent a little time in a medium-secure personality disorder unit whilst detained in prison, and has been medicated for adult ADHD.

7. The records reveal that he has been sentenced on 15 occasions for a total of 60 criminal offences, is currently serving the IPP sentence and has recently completed an 18-month determinate sentence. There is copious evidence of the involvement of alcohol in many of the offences. There is material in the bundle dating from a Parole Board hearing in February 2014 which reveals a professional view that personality disorder issues at the time of the sentence for the offence leading to the IPP sentence could be entirely understood in terms of his childhood and upbringing, which has been described by professionals as "chaotic and dysfunctional".

8. On 29 March 2006, Lewis Welsh was convicted of two offences of attempted robbery and one of robbery. He received the IPP sentence with a minimum two years left to serve after time spent in custody on remand, leaving the minimum term as one year 11 months and 26 days, which expired on 23 March 2008. He has served considerably more than that time. There is evidence of a substantial amount of work of a psychological nature taking place within prison.

9. On 13 February 2014, a Parole Board panel directed the claimant's release after hearing independent expert witness evidence from, amongst others, a consultant psychiatrist and a clinical forensic psychologist. The claimant himself gave detailed evidence. The panel decision concluded that the risk of serious harm posed by the claimant would be at a medium level and could be managed in the community, subject to licence conditions. The 3panel in 2014 also reflected that this was an unusual case, commenting that, at the oral hearing, Lewis Welsh had provided an insightful analysis of his risk: in particular, the emotions he had difficulty dealing with, the alcohol use, which clouded his judgment, and his personal unhappiness, recognising in himself an element of self-destruction.

10. On 24 February 2015, the Secretary of State for Justice released him on life licence. One of the conditions of his licence was that he should be well behaved and not do anything which would undermine the purposes of supervision on licence, which are to protect the public by ensuring their safety would not be placed at risk and to ensure his successful re-integration into the community. Shortly thereafter, however, on 1 May 2015, the licence was revoked after an incident in which it was said the claimant had threatened neighbours in the property where his partner lived and had caused damage to a door.

11. On 8 October 2015, the claimant was once again released on licence, after an oral hearing before a Parole Board panel, but was once more recalled to custody on 1 March

2018, where he currently remains. This recall followed an initially positive response to probation supervision, and a job with Blaby District Council. But, on 6 February 2017, Mr Welsh was charged with common assault and battery of which he was later convicted and then on 5 January 2018, he received a financial penalty for a public order offence. Alcohol was involved in both cases.

12. Further, on 14 February 2018, Mr Welsh was arrested after an allegation he had assaulted his partner, although it should be noted he advanced significant compassionate context to the alleged offence, which he sought to explain as an accident when lashing out at a piece of furniture. When the police attended at his home, they found an air rifle. His grounds in this case say that he returned home very upset after giving evidence at his brother's criminal trial for aggravated attempted murder and he had come across his mother there who, it is clear from the papers, is a significant negative figure in his personal history.
13. It was on 28 February 2018 that the claimant's probation officer requested his recall to custody and the Secretary of State revoked his licence on 1 March 2018. He later received a determinate sentence of 18 months regarding the air rifle possession. He had completed that determinate sentence in April 2019 and became eligible for release.
14. Mr Welsh's case appears to have been sent for review on 16 April 2018 and then deferred for the outcome of the new matters to be reported and additional documents to be added to the dossier. The information then came to hand from the offender manager that he had been sentenced to 18 months' adult custody for the offence of possession of a firearm. The matter was again deferred. By the end of August, it was reactivated and sent for a paper review on 19 September 2018.

The Decision under Challenge

15. The single member who considered the large dossier of papers decided, on 17 September 2018, on the basis of the papers alone, that it was inappropriate to direct the claimant's release. The following reasons were given in s.8, “Conclusion and Decision of Panel”, of that 19 September decision:

> “You have been convicted of a domestic incident and possession of a firearm. Prior to those convictions, you were convicted of common assault and a POA offence. Further risk reduction work to address your alcohol use, relationships, coping skills and thinking skills is required before a panel of the Board would consider you safe to be released. 4While this work remains outstanding your risk of harm to the public remains too high for release to be directed. You remain subject to the new sentence

until April 2019, in any event. The panel considered that, while core risk reduction work remains outstanding, the risk you present to the public outweighs the benefits to you of a progressive move to open conditions. As a result, the panel did not recommend that you go to open conditions. You have not been referred for an oral hearing and your review has been concluded with a paper decision."

16. On 27 September 2018, the claimant's representative, who had not been aware of the September review, made further written submissions on which they requested an oral hearing. The resulting refusal made on 3 October 2018 by the single member is the decision under challenge in this case. The operative part of that decision was in the following terms:

"The MCA duty member has considered the UKSC judgment in the case of **Osborn**, **Booth and Reilly** and is not persuaded that an oral hearing is appropriate in this case. There is a dossier of 766 pages which provides a great deal of information as to your risk issues and background to your case. You have been convicted of further violent offences about which there are considerable details in the paperwork and the facts of these incidents go directly to your risk of causing serious harm. The MCA duty member notes that the MCA member who considered your case and the substantial dossier identified further outstanding areas of risk evident by your behaviour and determined that these should be addressed prior to your release but to open conditions. There is nothing in the representations that persuade the MCA duty member that this conclusion was not entirely reasonable and appropriate."

17. Mr Jude Bunting, who appears before me on behalf of Mr Welsh, argues that this reasoning reveals a number of errors of law which require this court to quash the decision based on it.

Legal Framework

18. Section 28(7) of the Crime (Sentences) Act 1997 entitles an indeterminate sentence prisoner to have his case referred to the Parole Board by the Secretary of State at any time after he has served the relevant part of his sentence and also entitles him to reviews by them every two years thereafter. Section 28(6) provides that the defendant may direct an indeterminate sentence prisoner's release where it is satisfied that the risk he poses can be managed in the community. Release from an indeterminate prison sentence is on life licence (s.31(1) of the 1997 Act). Section 32(1) of that Act gives power to the Secretary of State to revoke an offender's licence and to recall him to prison. By s.32(6), on the revocation of the licence of any life prisoner, he shall be liable to be detained in pursuance of his sentence.

19. Of central importance in this matter is the case of Osborn and Booth v. The Parole Board [2014] AC 1115 in which the scope of the obligations of fairness in parole decisions was examined. Mr Osborn had been released on licence, but recalled to prison having breached the terms of that licence. In that case, as here, the Secretary of State referred the case but the Board, by a single member examining the papers, declined to recommend release.

20. The request for an oral hearing was refused in that case. The grounds that were given were that the disputed facts were not central to recall and the refusal of release. The Supreme Court there held that the panel of the Parole Board was required to hold a hearing before determining an application for release or transfer to open conditions, whenever fairness to 5the prisoned required it in the light of the facts of the case and the importance of the issues at stake. In particular, the question whether fairness required a prisoner to be given an oral hearing is different from that as to whether his application would be likely to succeed and it could not be answered by assessing that likelihood.

21. Lord Reed, with whom the rest of the Supreme Court agreed, began his judgment with a summary of the principles applicable to the circumstances in which the Parole Board is required to hold an oral hearing, noting that, of the three cases before the court, one concerned a determinate sentence prisoner released on licence and then recalled, but the others were indeterminate sentence prisoners who had served their minimum terms. The principles are, plainly applicable to the facts of Mr Welsh's case. Those passages of particular relevance are emboldened below in the text and [2] records materially as follows:

> "i) In order to comply with common law standards of procedural fairness, the board **should hold an oral hearing** before determining an application for release, or for a transfer to open conditions, **whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake**. By doing so the board will also fulfil its duty under section 6(1) of the Human Rights Act 1998 to act compatibly with article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in circumstances where that article is engaged.
>
> ii) It is impossible to define exhaustively **the circumstances in which an oral hearing will be necessary, but such circumstances will often include the following**:
>
> > a) Where facts which appear to the board to be important are in dispute, or **where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility**. The board

should guard against any tendency to underestimate the importance of issues of fact which may be disputed or open to explanation or mitigation.

b) **Where the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed and addressed. That is likely to be the position in cases where such an assessment may depend upon the view formed by the board (including its members with expertise in psychology or psychiatry) of characteristics of the prisoner which can best be judged by seeing or questioning him in person**, or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds, **or where the board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist. Cases concerning prisoners who have spent many years in custody are likely to fall into the first of these categories**.

c) Where it is maintained on tenable grounds that a face to face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him.

d) Where, in the light of the representations made by or on behalf of the prisoner, it would be unfair for a 'paper' decision made by a single member panel of the board to become final without allowing an oral hearing: for example, if the representations raise issues which place in serious question anything in the paper decision which may in practice have a significant impact on the prisoner's future management in prison or on future reviews.

iii) In order to act fairly, the board **should consider whether its independent assessment of risk, and of the means by which it should be managed and addressed, may benefit from the closer examination which an oral hearing can provide**.

iv) The board should also bear in mind that **the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute**.

v) **The question whether fairness requires a prisoner to be given an oral hearing is different from the question whether he has a particular likelihood of being released or transferred to open conditions, and cannot be answered by assessing that likelihood**.

vi) **When dealing with cases concerning recalled prisoners, the board should bear in mind that the prisoner has been deprived of his freedom, albeit conditional. When dealing with cases concerning post-tariff indeterminate sentence prisoners, it should scrutinise ever more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff**.

vii) …

viii) …

ix) …
x) **'Paper' decisions made by single member panels of the board are provisional. The right of the prisoner to request an oral hearing is not correctly characterised as a right of appeal. In order to justify the holding of an oral hearing, the prisoner does not have to demonstrate that the paper decision was wrong, or even that it may have been wrong: what he has to persuade the board is that an oral hearing is appropriate**.
xi) **In applying this guidance, it will be prudent for the board to allow an oral hearing if it is in doubt whether to do so or not**.
xii) …
xiii) …"

The Submissions of the Claimant

22. Mr Bunting drew my attention to some further paragraphs in the judgment that illustrate what he says is the clear requirement in the present case for there to have been an oral hearing ordered by the Board. He emphasised that, among the criteria listed by Lord Reed, it was particularly important to note that a "paper" decision was not a final decision and, further, that a prisoner need only show it was appropriate for there to be an oral hearing not that he had an appealable point with which to challenge the first decision. In paras.94 and 95 of **Osborn**, Lord Reed said the following:

> "94 … it is important to understand the provisional nature of a decision made by the single member panel that the prisoner is unsuitable for release. The right conferred on the prisoner, following that decision, to request an oral hearing is not a right of appeal. The prisoner does not have to demonstrate that the decision was (or may have been) wrong: what he has to persuade the board is simply that an oral hearing is appropriate. . The unfairness which results from the board's treatment of the request for an oral hearing as an appeal is illustrated by the case of the appellant Booth, in which the ICM assessor identified the critical question as being 'whether the grounds of the appeal are justified and if an oral hearing would make any material difference to the paper decision'. The request for an oral hearing was thus decided on the basis that the earlier decision was presumptively correct. This is to put the cart before the horse. If fairness requires an oral hearing, then a decision arrived at without such a hearing is unfair and cannot stand. The question whether an oral hearing is required cannot therefore be decided on the basis of a presumption that a decision taken without such a hearing is correct."

It is submitted by Mr Bunting, and I accept, the test is not utility it is fairness. This reflects further Lord Reed at para.6 in **Osborn**.

23. In the present case, Mr Bunting referred to the significant hintergrund of life-long psychological difficulties and his client's work to overcome them, both during and after his periods of imprisonment. He also points importantly to Mr Welsh's approach to his own rehabilitation. The context of this case, he said, emphasised the importance of the Board's own opportunity to assess his client in person when considering the core question that arose concerning possible release: namely, risk.

24. Mr Bunting referred to the fact that his client had been in and out of prison much of his life, drawing my attention to those features of his background which have attracted the attention of the court previously on sentencing and also of the therapeutic agencies in the course of his offending career. He also drew attention to the fact that the claimant's version of events, which led to his recall, differed significantly from the account in the dossier and to the nature of the explanation involving, as it did, the obligation to give evidence at his brother's trial on the day of the incident Mr Bunting said this offered context and some mitigation and, therefore, required, in fairness, to be aired before the Board. The Board needed, he urged, an opportunity to judge the claimant's credibility and assess for themselves, in that context, his response to the concerns about risk.

25. As has been stated above, the factual matters concerned the circumstances of the possession of the air rifle for which he was convicted and, further, so it is said that this was a fact known to his offender manager to whom he had explained how he used it to play paintball. Moreover, it is the claimant's case that the offender manager's assessment of the previous incident in which domestic violence was alleged, did not, on Mr Welsh's case, reflect the true context of what occurred, nor did some other matters referred to in the dossier. The claimant asserted he would have material evidence to give; the material supporting his case bears out that submission. Furthermore, the dossier contained recommendations from professionals that Mr Welsh might progress to open conditions.

Consideration

26. I accept the submissions on behalf of Mr Welsh. It is clear to me that the Parole Board did not apply the correct test in law when considering whether to afford him an oral hearing. The words used by the single member in her decision refusing the oral hearing on 3 October included the following [emphasis added]:

> "The MCA member who considered your case and the substantial dossier identified further outstanding areas of risk evident by your behaviour and determined that these

should be addressed prior to your release to open conditions. There is nothing in the representations that persuade the MCA duty member that this conclusion was not entirely reasonable and appropriate."

In my judgment, it shows clearly that the view of the board member was that Mr Welsh had not persuaded her that the previous and, of course, only preliminary, decision of 19 September was erroneous. In other words, she treated the application for an oral hearing as if it had been an application to appeal or review the previous decision in respect of which the prospects of success were determinative. This is an error of law.

27. Furthermore, in any event, in my judgment, this is one of those cases where the Board should have been particularly pre-disposed to the idea of an oral hearing and there was nothing here that should have dissuaded them from holding one. This is the case, essentially, on account of the nature of the sentence being served by Mr Welsh, taken with his potential contribution to issues of fact and, in particular, the usefulness of a personal interaction of Mr Welsh with the Parole Board. This would plainly feed into the assessment of risk posed by release or transfer. The view that the Board took of his explanation of the circumstances of the recent domestic incident would necessarily influence credibility and what weight they might give to the views about risk that were expressed.

28. A comment made in the earlier oral hearing before the Parole Board has been mentioned above. It has particular resonance in this regard, recognising expressly that Mr Welsh's personal contribution had value. It is worth repeating here. It was contained in the oral hearing decision letter dated 13 February 2014 in the following terms:

"You provided the panel with an in-depth and, in the panel's view, insightful analysis of your risk and, in particular, your emotions with which you could not deal, your alcohol use clouds your judgment and your lack of happiness with yourself. You believe you self-destructed."

29. However, in my judgment, there is one further aspect of the case and the applicable jurisprudence that is particularly compelling in the circumstances here, even were the misapprehension of the test or the factual dimensions to be less obvious. This aspect is 9reflected in the passage from the judgment in **Osborn** where Lord Reed said the following at [67] and [68]:

"67. There is no doubt that one of the virtues of procedurally fair decision making is that it is liable to result in better decisions, by ensuring that the decision maker receives all relevant information and that it is properly tested, [but] … At least two other important values are also engaged.

. The first was described by Lord Hoffmann (ibid) as the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I

would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of … judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken."

30. In my judgment, there is a clear case, for the reasons advanced by Mr Bunting, that the Parole Board went wrong in law and their decision must be quashed for the error of law identified above. Osborn shows that there is, in effect, a presumption in favour of an oral hearing in circumstances such as those that obtain here and there was nothing in this case to displace that presumption. To the contrary, there were a number of indicators that an oral hearing, in fairness, was required. The decision was also procedurally unfair.

31. Accordingly, I quash the decision and I direct that there be an oral hearing before the Parole Board.